CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 341.

THE UNITED STATES

vs.

[redacted] AND SONS COMPANY,

A CORPORATION, ETC., AND [redacted] COMPANY, A CORPORATION, ETC.

[redacted], 1916.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 541.

THE UNITED STATES

vs.

SHERMAN AND SONS COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (plaintiff below), *against* SHERMAN & SONS COMPANY, DEFENDANT IN ERROR (defendant below).	Actions No. 1 and No. 2.

On writ of error to the United States District Court for the Southern District of New York. Before Ward and Rogers, circuit judges, and Hand, district judge.

This cause having come on for argument before the court, after hearing Addison S. Pratt, Esq., special assistant to the Attorney General, on behalf of the plaintiff in error, and Thomas M. Lane, Esq., on behalf of the defendant in error, it is, in view of the important questions arising on the record herein, and the doubt which the court entertains as to the correct decision thereof, desired that the instruction of the Supreme Court be had.

Statement of facts.

The United States of America, the plaintiff below, sued out two writs of error to this court to review the final judgments, entered on April 17, 1914, in the United States District Court for the Southern District of New York, in the two above entitled causes, sustaining a demurrer interposed by the defendant to the complaint in each of the said actions, and dismissing the complaint for the failure of the plaintiff to file an amended complaint within the time granted by the court.

Both actions were brought to recover from the defendant a balance of duties which, it was alleged, accrued upon the importation by the defendant at the port of New York from certain foreign countries in the months of April, May, and June, 1909, and July and August, 1909, respectively, of certain merchandise, to wit, laces, which were dutiable under the tariff act of July 24, 1897, and the amounts of which, it was alleged, were fixed by reliquidations of the entries made by the collector of customs of the port of New York on June 4, 1913.

The complaint in action No. 1, after alleging the sovereignty of the plaintiff and the incorporation of the defendant under the laws of the State of New York, with its principal office for the transaction of business in the southern district of New York, was in the words and figures following, to wit:

"3. On or about the days in the months of April, May, and June, 1909, enumerated and set forth in the schedule hereto annexed, marked Exhibit A, and made a part hereof, the defendant imported and brought into the United States at the port and collection district of New York from foreign countries, to wit, Syria and Egypt, upon

the vessels likewise named in the said schedule, certain goods, wares, and merchandise, to wit, laces, which were then and there, and because of said importations, subject to duty by law under and pursuant to the provisions of the act of Congress approved July 24, 1897, and entitled 'An act to provide revenue for the Government and to encourage the industries of the United States.'

"4. On or about the days so enumerated and set forth in the said schedule, the defendant made, or caused to be made, entry of the said goods, wares and merchandise with the collector of the said port and collection district of New York, the entries thereof being given by the said collector the numbers set opposite the said days in the said schedule.

3 "5. Thereafter, and on or about the days also enumerated and set forth in the said schedule, the said collector duly assessed and liquidated the duties accruing, and which had accrued, upon the said goods, wares, and merchandise by reason of the importations aforesaid, at the amounts also enumerated and set forth in the said schedule, and by reason of said importations and the said liquidations there became due and payable to the plaintiff from the defendant the said amounts as the duties upon the said goods, wares, and merchandise, and the said amounts were duly paid to the plaintiff by the defendant, and the said goods, wares, and merchandise were duly delivered to the defendant.

"6. On or about the 4th day of June, 1913, and more than one year subsequent to the respective dates of entry referred to in paragraph 4 hereof, the said collector reliquidated the duties accruing, and which had accrued, upon the said goods, wares, and merchandise, at the amounts also enumerated and set forth in the said schedule.

"7. Subsequent to the 4th day of June, 1913, and more than fifteen days prior to the commencement of this action, the plaintiff duly notified the defendant of the said reliquidations and of the amount of the said duties which remained unpaid, being the difference between the original liquidations and the reliquidations, to wit, the sum of $870.60, and demanded payment thereof, but the defendant has failed and refused, and still fails and refuses, to pay the said sum or any part thereof."

Judgment against the defendant was then demanded for the said sum of $870.60, with interest upon each item, as shown in the schedule annexed to the complaint, from the date of each respective entry, together with the costs and disbursements of the action.

The complaint in action No. 2 was in exactly the same words and figures as the complaint in action No. 1, with the exception that the months alleged in paragraph 3 as the time when the importations were made were July and August, 1909, instead of April, May, and June, 1909, and with the further exception that, in addition to all the allegations contained in the complaint in action No. 1 and

4 above set forth, the complaint in action No. 2 contained an additional paragraph which was in words and figures following, to wit:

"The said entries were reliquidated by the said collector, as aforesaid, pursuant to his findings and decisions that they, as well as the consular invoices presented with them, upon the basis of which the said entries were originally liquidated, as aforesaid, were false and fraudulent, and that the original liquidations and the delivery of the said goods, wares, and merchandise, aforesaid, had been effected by and through the fraud of the defendant."

Judgment against the defendant was then demanded for the sum of $1,433.40, the amount of the difference between the original liquidations and the reliquidations, with interest, costs, and disbursements, as in action No. 1.

The defendant demurred to the complaint in each action on the ground that it did not state facts sufficient to constitute a cause of action. The demurrers were sustained by Hon. Alfred C. Coxe, circuit judge, sitting in the district court, upon his opinion rendered in the case of United States v. Federal Sugar Refining Company and reported in 211 Fed., 1016, with leave to the United States to amend its complaint, if it was so advised. The United States electing not to plead over, final judgments were thereupon entered on April 17, 1914, in favor of the defendant, dismissing the complaints.

Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court of the United States are as follows:

(1) Can an importer of dutiable merchandise, when sued by the United States for a balance of duties found to be due upon a reliquidation of the entry, attack the validity of the reliquidation, where it appears upon the face of the complaint that the reliquidation was made more than a year after the entry, and where the complaint contains no allegation of the presence of a protest or of fraud, or is the remedy provided by the customs administrative act (act of June 10, 1890, and act of August 5, 1909, 26 Stat. L., 136, and 36 Stat. L., 100), viz, of protest, payment of the full amount of duties ascertained to be due upon the reliquidation and appeal to the board of general appraisers, and thence to the courts, the only way in which he may attack the validity of the reliquidation?

(2) Does the complaint in action No. 1 herein, all of the allegations in which, with the exception of the formal allegations of sovereignty and incorporation, are hereinabove set forth, state a good cause of action?

(3) If the foregoing question is answered in the negative, then is it sufficient for the United States in order to state a good cause of action to allege the finding or decision of the collector that there was fraud, as in action No. 2 herein, without alleging in what connection the collector had made his finding or decision of fraud, i. e., whether he had found fraud in the dutiable value, or in the classification, or in the quantity of the merchandise, and without alleging the presence of fraud as a fact or the facts constituting the fraud?

In accordance with the provisions of section 239 of the Judicial Code, the foregoing questions of law are by the Cir-

cuit Court of Appeals of the United States for the Second Circui
hereby certified to the Supreme Court of the United States.

Dated, New York, June 27th, 1914.

H. G. WARD,
HENRY WADE ROGERS,
LEARNED HAND,
Judges of the United States Circuit Court of Appeals for the Second Circuit, sitting in said causes.

7 United States Circuit Court of Appeals for the Second Circui

UNITED STATES OF AMERICA,
Second judicial circuit, ss:

I, William Parkin, clerk of the United States Circuit Court o Appeals for the Second Circuit, do hereby certify that the foregoin certificate and statement of facts in the cases therein entitled, wa duly filed and entered of record in my office by order of said cour and as directed by said court, the said certificate is by me forwarded t the Supreme Court of the United States for its action thereon.

In witness whereof, I have hereunto subscribed my name an affixed the seal of said court, at the city of New York, this 29th da of June, 1914.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals, for the Second District.

(Indorsed on cover:) File No. 24,285. U. S. Circuit Cour Appeals, 2d Circuit. Term No. 541. The United States vs. Sherma & Sons Company. Certificate. Filed June 30th, 1914. File N 24,285.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SHERMAN & SONS COMPANY.
No. 541.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled cause for argument.

This cause comprises two suits numbered 1 and 2 in the court below, brought by the United States to recover a balance of duties alleged to have accrued upon importations of laces by the defendant at New York, from certain foreign countries, which were dutiable under the Tariff Act of July 24, 1897.

Action No. 1 was to recover duties alleged to have accrued upon importations made in April, May, and June, 1909, while Action No. 2 was to recover alleged accrued duties upon importations

made in July and August, 1909. The complaints alleged that after entry of said importations the Collector of Customs of the Port of New York had duly liquidated the duties, which duties were paid and the goods were delivered to the defendants; that more than one year subsequent to the date of entry the collector reliquidated the duties and notified the defendant of the amount more than 15 days prior to the beginning of the action and demanded payment, which payment was refused. The complaints were identical in form (other than as to dates of importations), except that the complaint in Action No. 2 contained an additional allegation that the original entries, as well as the consular invoice presented with them, were false and fraudulent, and that the original liquidation and delivery of the goods had been effected by and through the fraud of the defendant.

The defendant demurred to the complaint in each case on the ground that it did not state facts sufficient to constitute a cause of action. The demurrers were sustained, with leave to the United States to amend its complaints, and the latter electing not to plead over, final judgments were entered in favor of the defendant, dismissing the complaints, whereupon the United States sued out writs of error from the Circuit Court of Appeals for the Second Circuit, which court certified certain questions to this court as follows:

1. Can an importer of dutiable merchandise, when sued by the United States for a balance of

duties found to be due upon a reliquidation of the entry, attack the validity of the reliquidation, where it appears upon the face of the complaint that the reliquidation was made more than a year after the entry, and where the complaint contains no allegation of the presence of a protest or of fraud, or is the remedy provided by the Customs Administrative Act (Act of June 10, 1890, and Act of August 5, 1909, 26 Stat. 136 and 36 Stat. 100), viz, of protest, payment of the full amount of duties ascertained to be due upon the reliquidation and appeal to the Board of General Appraisers, and thence to the courts, the only way in which he may attack the validity of the reliquidation?

2. Does the complaint in Action No. 1 herein, all of the allegations in which, with the exception of the formal allegations of sovereignty and incorporation, are hereinabove set forth, state a good cause of action?

3. If the foregoing question is answered in the negative, then is it sufficient for the United States in order to state a good cause of action to allege the finding or decision of the Collector that there was fraud, as in Action No. 2 herein, without alleging in what connection the Collector had made his finding or decision of fraud, *i. e.*, whether he had found fraud in the dutiable value, or in the classification, or in the quantity of the merchandise, and without alleging the presence of fraud as a fact or the facts constituting the fraud?

The decision of this court upon the questions certified will have the effect of expediting similar suits now pending and involving large sums of money.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1914.

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

THE FACTS.

The case comes before this court upon a certificate from the Circuit Court of Appeals for the Second Circuit, under section 239 of the Judicial Code, of three questions of law, as follows:

> (1) Can an importer of dutiable merchandise, when sued by the United States for a balance of duties found to be due upon a reliquidation of the entry, attack the validity of the reliquidation, where it appears upon the face of the complaint that the reliquidation was made more than a year after the entry, and where the complaint contains no

allegation of the presence of a protest or of fraud, or is the remedy provided by the customs administrative act (act of June 10, 1890, and act of August 5, 1909, 26 Stat. L. 136, and 36 Stat. L. 100), viz, of protest, payment of the full amount of duties ascertained to be due upon the reliquidation and appeal to the Board of General Appraisers, and thence to the courts, the only way in which he may attack the validity of the reliquidation?

(2) Does the complaint in action No. 1 herein, all of the allegations in which, with the exception of the formal allegations of sovereignty and incorporation, are hereinabove set forth, state a good cause of action?

(3) If the foregoing question is answered in the negative, then is it sufficient for the United States in order to state a good cause of action to allege the finding or decision of the collector that there was fraud, as in action No. 2 herein, without alleging in what connection the collector had made his finding or decision of fraud, i. e., whether he had found fraud in the dutiable value or in the classification or in the quantity of the merchandise, and without alleging the presence of fraud as a fact or the facts constituting the fraud?

The suits were civil actions of assumpsit brought by the Government against an importer to collect certain customs duties alleged to be due, and were brought in the United States District Court for the Southern District of New York. Demurrers

filed by the defendant were sustained by Circuit Judge Coxe, sitting in the District Court, on the strength of an opinion rendered by him, in 1913, in *United States* v. *Federal Sugar Refining Company* (211 Fed. 1016), with leave to the Government to amend. The United States elected not to plead over, and final judgment was entered April 17, 1914, in the District Court dismissing the complaints. The United States took out a writ of error from the Circuit Court of Appeals.

The complaints in the suit set forth the following facts:

In Action No. 1:

(*a*) Importations and entries of laces by the defendant on certain dates, dutiable under the tariff act of July 24, 1897.

(*b*) A liquidation by the collector, on or about said dates of entry, of the duties accruing.

(*c*) Payment of the duties so liquidated by the importer and delivery to the importer of the goods.

(*d*) On June 4, 1913, and more than one year subsequent to dates of entry, a reliquidation by the collector of the "duties accruing and which had accrued upon the said goods, wares, and merchandise at the amounts also enumerated and set forth in the schedule."

(*e*) After June 4, 1913, and more than fifteen days prior to beginning of the action, the United States notified the defendant of the reliquidation and demanded payment of the balance alleged to be

due over and above the amount of the prior liquidation.

(*f*) Failure and refusal of the defendant to pay.

Action No. 2:

Contained the same allegations as Action No. 1 except that it amplified the facts contained in (*d*) above, as set out in the following:

> The said entries were reliquidated by the said collector, as aforesaid, pursuant to his findings and decisions that they, as well as the consular invoices presented with them, upon the basis of which the said entries were originally liquidated, as aforesaid, were false and fraudulent, and that the original liquidations and the delivery of the said goods, wares, and merchandise, aforesaid, had been effected by and through the fraud of the defendant.

The defendant's demurrer set out that the complaint in each action did not state facts sufficient to constitute a cause of action.

THE QUESTIONS INVOLVED.

The Government claims:

(1) That on a suit by the Government for duties alleged to be due the only defenses open to an importer are—

(*a*) That the collector did not make the liquidation or decision alleged; (*b*) payment.

And that in order to maintain any other defense he must avail himself of the exclusive remedy pro-

vided by the tariff act of 1909; *i. e,* of protest to the collector, payment of the duties, and appeal to the Board of General Appraisers and thence to the United States Court of Customs Appeals. The statute involved is as follows (act of August 5, 1909, 36 Stat. 11, sec. 14):

> That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within fifteen days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within fifteen days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the Board of Nine General Appraisers, for due assignment and de-

termination as hereinbefore provided; such determination shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the United States Court of Customs Appeals within the time and in the manner provided for in this act.

(2) That even if the provisions of the tariff act of 1909 do *not* afford the exclusive remedy, the declaration sets forth a complete case at law by alleging the importation and entry of the goods, the official act of liquidation by the collector of the amount of duties due, and failure on the part of the importer to pay; the Government maintains that the liquidation of a collector being an official act within his jurisdiction, must be presumed to have been performed according to law, until proof to the contrary is made by the importer in his defense. To this effect is the recent case of *Vitelli* v. *United States* (February, 1914) in the Court of Customs Appeals.

The Government further maintains that if the importer wishes to take advantage of a defense that the first liquidation had become final and conclusive after the lapse of a year, such defense must be set up by plea or answer and not by demurrer.

THE LAW.

POINT I.

In the revenue system, where Congress has provided a special method and special tribunals for the correction of errors of tax officials, this method and these tribunals are exclusive, and the taxpayer is restricted in his right to resort to other remedies or other tribunals.

For fifty years special statutes have provided for methods of protest, appeal, and suit by persons attacking the validity of customs duties.

Under the tariff act of 1909 the Board of General Appraisers and the United States Court of Customs Appeals have exclusive jurisdiction to review the validity of a liquidation or a reliquidation by the collector of customs of the duties due on imported merchandise.

If the importer fails to protest and appeal to the board and thence to the courts, he can not contest the validity of the liquidation or reliquidation when sued in the District Court for the recovery of any additional duties thus found by the collector of customs to be due.

SUMMARY STATEMENT OF THE GOVERNMENT'S GENERAL ARGUMENT.

Customs duties become due and payable to the United States immediately upon importation. The act of importation imposes upon the importer the obligation to pay the legal duties.

Arnold v. *United States* (1815) 9 Cranch 104.

Meredith v. *United States* (1839) 13 Peters, 486.

Story, J. But although the duties thus accrue to the Government as a personal debt of the importer, upon the arrival of the goods in the proper port of entry; yet it is but a *debitum in praesenti solvendum in futuro* according to the requisitions of the revenue-collection act.

Stockwell v. *United States* (1871) 13 Wall. 531, p. 546.

Dumont v. *United States* (1878) 98 U. S. 142.

United States v. *Lyman* (1818) 1 Mason, 482.

United States v. *Cobb* (1882) 11 Fed. 76.

United States v. *One Case of Paintings* (1900) 99 Fed. 426 (C. C. A. 2nd Circ.).

United States v. *National Fiber Board Co.* (1904) 133 Fed. 596 (C. C. A. 2nd Circ.).

United States v. *Shallus* (1911) 2 Ct. Cust. App. p. 333.

In accordance with the above cases, the Government may sue in assumpsit or debt for the duties lawfully due; or, if a portion of the duties has been paid, to recover any balance claimed as due.

The obligation to pay taxes being an imperative one, the importer is allowed only such defenses or such methods of attacking the validity of a tax as Congress may choose to give him.

In the collection of its taxes and revenues the United States acts through summary process. Prompt payment of taxes is necessary to the existence of all governments, and the policy of the Federal laws is to require payment without litigation.

The Government has the right to require payment in any method fixed by it, and may determine for itself in what manner, at what time, and to what extent (if at all) the taxpayer may be allowed to contest in the courts the legality of a tax. Whether it will submit questions arising under the revenue laws to the judgment of judicial tribunals is within the jurisdiction of Congress to determine. As was said in *United States* v. *Habicht* (1910) 1 Ct. Cust. App., 53, p. 57, customs case: " For the enforcement of the rights of the importer in the cases, Congress has specifically prescribed methods of procedure."

Judge Taft, in another customs case, *D. M. Ferry & Co.* v. *United States* (1898) 85 Fed. 550, p. 553 (C. C. A. 6th Circ.), said:

> It is a well-settled principle in Federal jurisprudence that the Government of the United States has the right to provide for the summary collection of its revenues and to restrict the duty payer to certain special tribunals and certain specific remedies for acts of injustice that may be done on behalf of the Government under such a system.

In *Cheatham* v. *United States* (1875) 92 U. S. 85, p. 88 an internal revenue case, Mr. Justice Miller said:

> All Governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes and to be rigid in the enforcement of them.

> These measures are not judicial; nor does the Government resort, except in extraordinary cases, to the courts for that purpose. The revenue measures of every civilized Government constitute a system which provides for its enforcement by officers commissioned for that purpose. In this country this system for each State or for the Federal Government provides safeguards of its own against mistake, injustice, or oppression in the administration of its revenue laws. Such appeals are allowed to specified tribunals as the lawmakers deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise, are provided. In these respects the United States have, as was said by this court in *Nichols* v. *United States*, 7 Wall. 122, enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete.

The right of an importer to contest in court his liability to pay the customs tax or duty has been restricted as follows:

A. The importer can not replevy the goods in possession of the collector of customs.

> *Rev. Stat.* sec. 934.

B. A bill in equity will not lie to restrain collection of taxes.

> *Andreae* v. *Redfield* (1878) 98 U. S. 225, 232.
>
> See also *Snyder* v. *Marks* (1883) 109 U. S. 189.

C. The importer can contest the accuracy of the appraisal of his goods only before the special tribunal prescribed by Congress, whose decision is final and conclusive as to value when proceeding in accordance with the law. He can not contest the correctness of the appraisal in any suit in court. As was said in *Auffmordt* v. *Hedden* (1890) 137 U. S. 310, 329:

> The Government has the right to prescribe the conditions attending the importation of goods upon which it will permit the collector to be sued. One of those conditions is that the appraisal shall be regarded as final.

In early tariff acts, the importer had no right to a review in any fashion of the appraised value. The act of May 28, 1830, chapter 147 (4 Stat. 409) allowed him a right to demand reappraisement, but the decision of the collector in case of disagreement of appraisers was final. See also the Act of August 30, 1842, chapter 270, section 17 (5 Stat. 564); act of March 3, 1851, chapter 38, section 3 (9 Stat. 630). These acts were embodied in the Revised Statutes, section 2930, under which the collector's decision as to appraised value was incontestable in the courts.

Hilton v. *Merritt* (1884) 110 U. S. 97, 104.

Oelbermann v. *Merritt* (1887) 123 U. S. 356, 361.

Robertson v. *Frank Bros. Co.* (1889) 132 U. S. 17, 24.

Muser v. *Magone* (1894) 155 U. S. 240.

See as to the customs administrative act of 1890, section 13, and the power of Congress to constitute such finality of appraisals.

> *United States* v. *Passavant* (1898) 169 U. S. 16.
>
> *Oceanic Steam Navigation Co.* v. *Stranahan* (1909) 314 U. S. 320, 339.

D. Prepayment of the tax is, as a rule, a prerequisite to an attack in court upon its validity.

> *Cheatham* v. *United States* (1875) 92 U. S. 85, 89.
>
> While a free course of remonstrance and appeal is allowed within the departments befor the money is finally exacted, *the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent* to a resort to the courts by the party against whom the tax is assessed.

In *Springer* v. *United States,* 102 U. S. 586, an internal-revenue case, Mr. Justice Swayne said:

> The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreasonable. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the Government (p. 594).

E. Congress has in various successive statutes prescribed that the decision of the collector of customs as to the amount of duty payable, i. e., his liquidation, shall be final and conclusive, and incontestable in a suit in court, unless protest and appeal shall be taken by the importer in the manner set forth in the statute.

Act of March 3, 1839, c. 82 (5 Stat. 348).

Act of February 26, 1845, c. 22 (5 Stat. 727).

Act of June 30, 1864, c. 171, sec. 14 (13 Stat. 252).

Revised Statutes, secs. 2931 and 3011.

Act of June 10, 1890, c. 407, secs. 14, 15 (26 Stat. 137–8).

Act of May 27, 1898 (35 Stat. 403).

Act of August 5, 1909, section 28, subsections 14, 29 (36 Stat. 100).

The courts have uniformly held that the method provided by the statute for the testing of the legality of the collector's decision and of any error in the imposition of the tax is exclusive, and that if the importer does not follow this method, he can not avail himself of any other legal remedy.

Nichols v. *United States* (1868) 7 Wall. 122, 129–131.

Andreae v. *Redfield* (1878) 98 U. S. 225, 228, 232.

Arnson v. *Murphy* (1883) 109 U. S. 238, 243.

Porter v. *Beard* (1888) 124 U. S. 429.

Schoenfeld v. *Hendricks* (1894) 152 U. S. 691.

Gulbenkian v. *United States* (1911) 186 Fed. 133 (C. C. A. 2nd Circ.).

Houlder v. United States (1913) 4 Ct. Cust App. 247, p. 251.

The necessity of following the method of contesting the rightfulness of a tax or of a collector's decision or liquidation, prescribed by the statute, is equally great, whether such contest is sought to be made by the importer in a suit brought by himself or raised as a ground for defense in a suit brought by the Government.

The whole scheme of Federal legislation (as is shown in detail *infra*) discloses that for many years the intent of Congress is to confine all questions relating to the collection of revenue to the administrative officials in the first instance and to an appeal to the special tribunals.

The success of the attempt of the defendant in this case to contest the collector's action and liquidation, without proceeding by way of appeal as prescribed by the act of 1909, would conflict with the entire scheme of legislation as to customs matters, and would break down the principles on which the statutes have been based, viz, the inadvisability of attempting to administer customs laws through juries, the necessity of avoiding delay in collecting customs taxes, the desirability of having tariff questions determined by a special tribunal having expert knowledge and detailed experience in customs matters.

See especially *Gulbenkian* v. *United States* (1911) 186 Fed. 133, 135, 136 (C. C. A. 2d Circ.).

> The difficulty with this proposition is that it wholly ignores the provisions of the customs administrative act by which Congress has enacted a system whereby errors and mistakes of the customs officials can be corrected, and duties improperly exacted from the importer can be recovered. * * * Section 14 provides that the decision of the collector as to the rate and amount of duties (which necessarily involves classification) shall be final and conclusive, unless written notice of dissatisfaction is given within ten days. This notice sends the case to the Board of General Appraisers, and section 15 provides for a review of their decision in the court, and that all final judgments, when in favor of the importer, shall be paid by the Secretary of the Treasury.
>
> This system of corrective justice is complete in itself. * * * It must be concluded that Congress did not intend to allow any other mode to redress a supposed wrong in the operation of the laws for the collection of duties on imported merchandise.

DEFINITION AND LEGAL STATUS OF LIQUIDATION AND RELIQUIDATION.

The function of the collector of customs is clearly defined in the customs statutes and in the decided cases. He is the official whose duty it is to ascertain, determine, and assess in the first instance the

amount due to the Government for duties. His duty is to take the value of the goods as appraised by the appraisers, the weight as found by the weighers, and then to decide the classification of the goods, the rate of the duty, the charges, etc., to be included, and using these various elements to determine the amount due .

This is termed liquidating the duty.

(1) No statute prescribes any time within which the collector must liquidate. No statute prescribes any particular form of liquidation. The decision of the collector fixing the duties as estimated by him, howsoever and whenever arrived at, constitutes his liquidation.

Davies v. *Miller,* 130 U. S. 284.

Abner Doble Co. v. *United States* (1902) 119 Fed. 152 (C. C. A. 9th Circ.).

Gandolfi v. *United States* (1896) 74 Fed. 549 (C. C. A. 2d Circ.).

United States v. *De Riviera* (1896) 73 Fed. 679.

Pacific Creosoting Co. v. *United States* (1912) 196 Fed. 35 (C. C. A. 9th Circ.).

Treasury Decisions 20350, G. A. 4309; 10530, G. A. 180; 24266, G. A. 5294.

Arnson v. *Murphy* (1885) 115 U. S. 579.

The mere exaction of the duties is necessarily the decision of the collector (within the meaning of the Revised Statutes, section 2931), and on this being shown in any suit it stands as conclusive until the plaintiff shows the proper steps to avoid it.

(2) The collector's decision or liquidation is not final and conclusive upon the Government. He may reliquidate, i. e., abandon his first decision and make a new liquidation, because either of fraud, error, or mistake in his first liquidation. (See Brief, *infra,* pp. 54–56.)

United States v. *Leng* (1883) 18 Fed. 15.

United States v. *Mexican International R. R. Co.* (1907) 151 Fed 545 (C. C. A. 5th Circ.).

United States v. *Calhoun* (1911) 184 Fed. 499.

Dickson v. *United States* (1904) 131 Fed. 573.

Knowles v. *United States* (1903) 122 Fed. 971.

United States v. *Schwarz* (1912) 3 Ct. Cust. App., 24.

United States v. *Hawley* (1912) 3 Ct. Cust. App. 456, 458.

A reliquidation " vacates and annuls " the old liquidation and is a new liquidation " in lieu of the original."

Robertson v. *Downing* (1888) 127 U. S. 607, 613.

United States v. *Leng* (1883) 18 Fed. 15, p. 18.

Louisville Pillow Co. v. *United States* (1906) 144 Fed. 386, p. 387 (C. C. A. 6th Circ.).

United States v. *Campbell,* 10 Fed. 816, p. 820.

There is no obligation on a collector to reliquidate, but it is a privilege which has

been sustained by the courts against the importer, who is liable * * * for whatever duties ought to have been fixed and paid by him.

(3) The provisions of section 14 of the tariff acts of 1890 and 1909 apply to such a reliquidation.

Louisville Pillow Co. v. *United States* (1906) 144 Fed. 386 (C. C. A. 6th Circ.).

Treasury Decisions 14645 G. A. 2403 (1894).

Robertson v. *Downing* (1888) 127 U. S. 607.

United States v. *Whitridge* (1905) 197 U. S. 135.

(4) Liquidation by the collector being the regular method of ascertaining and fixing the customs tax due from the importer, and the collector being the officer of the Government on whom the duty is regularly imposed, such liquidation is ordinarily a prerequisite before the Government may maintain suit to recover duties.

A reliquidation is a necessary preliminary at all times to any suit by the Government to recover a deficiency under a preceding erroneous liquidation, for until such reliquidation, the preceding liquidation is valid.

United States v. *Campbell* (1882) 10 Fed. 816, 822.

United States v. *Leng* (1883) 18 Fed. 15.

United States v. *McDowell* (1884) 21 Fed. 563, 564.

Two cases hold that *where there has been no original liquidation* and therefore no opportunity for a reliquidation, the Government may sue for the duties which the importer is obliged to pay.

United States v. *Boyd* (1885) 24 Fed. 690.
United States v. *National Fibre Board Co.* (1904) 133 Fed. 596.

A charge to the jury in *United States* v. *Koblitz* (1882) 15 Fed. 900, phrased rather ambiguously, may be construed to hold the same.

The case of *United States* v. *Nuckolls* (1902) 118 Fed. 1005 (C. C. A. 8th Circ.) presents special facts, and is authority only for the precise point decided on the precise facts involved.

(5) The only restriction on the right of the collector to reliquidate is to be found in section 21 of the act of June 22, 1874 (18 Stat. 190), which made the original liquidation in certain cases final and conclusive "after the expiration of one year from the time of entry *in the absence of fraud* and in the absence of protest by the owner, importer, agent, or consignee."

This act is a statute of limitations purely.

It contains no grant of power of authority not previously possessed by the collector, but restricts and limits a power and authority previously held by him.

United States v. *Calhoun* (1911) 184 Fed. 499. (Aff. in 215 Fed. 709, C. C. A. 2d Circ. 1914.)

> Since subsection 14 of section 28 [of the act of 1909], which has been in substantially the same form since before 1874, provides that the liquidation of the collector shall only be final and conclusive upon all parties interested in the goods, the result was that prior to 1874 there had been an unlimited right on the part of the collector to reliquidate at any time he saw fit, but that the importers had no such right. *The act of 1874 imposed such a limitation upon the collector but gave him no new powers.* * * * (p. 502).
>
> Section 21 of the act of June 22, 1874, was merely a statute of limitation, and, but for the exception as to fraud, would have concluded the collector from reliquidating at the end of the year. (p. 504).
>
> See also *United States* v. *Phelps* (1879) 17 Blatchf. 312.
>
> *Abner Doble Co.* v. *United States* (1902) 119 Fed. 152. (C. C. A. 9th Circ.).
>
> *Hawley* v. *United States* (1912) 3 Ct. Cust. App. 456, p. 458.
>
> *United States* v. *Campbell,* 10 Fed. 816, p. 822.
>
> *Treasury Decisions* 14689, G. A. 2411 (1894) p. 120.

This restriction contained in the act of 1874 is discussed in detail later under Point II of this Brief.

The remedies provided by the tariff acts for an importer who seeks to attack the validity of a customs tax as liquidated or reliquidated by the collector are exclusive, as shown by the following detailed statement of the successive statutes and decisions construing them.

Under the early tariff acts, an importer claiming duties as fixed by the collector to be illegal was obliged to first pay the duties under protest, and he might then sue and recover from the collector on a common-law action of assumpsit for money had and recovered.

Elliott v. *Swartwout* (1836) 10 Pet. 137.

Under the act of March 3, 1839, chapter 82 (5 Stat. 348), the right of an importer to sue to recover after payment of duties under protest was taken away, and the decision of the Secretary of the Treasury was made final.

Cary v. *Curtis* (1845) 3 Howard 236.

> In devising a system for imposing and collecting the public revenue, it was competent for Congress to designate the officer of the Government in whom the rights of that Government should be represented in any conflict which might arise, and to prescribe the manner of trial. * * * There is nothing arbitrary in such arrangements; they are general in their character; are the result of principles inherent in the Government; are defined and promulgated as the public law.

Under the act of February 26, 1845, chapter 22 (5 Stat. 727), the right of an importer to sue to recover duties paid under protest was restored.

> *Curtis, Adm'r.* v. *Fiedler* (1863) 2 Black 461.

And this remedy was held to be the exclusive remedy provided for an importer by Congress.

> *Nichols* v. *United States* (1868) 7 Wall. 122.

The act of 1845 was in turn superseded by the act of June 30, 1864, chapter 171 (13 Stat. 252), section 14 (reproduced in Revised Statutes sec. 2931).

> *Barney* v. *Watson* (1875) 92 U. S. 449, 453.
>
> (See also, for general history of actions against collectors, *Barney* v. *Richards* (1895) 157 U. S. 352.

Under the above statutes, the decision of the collector as to the rate and amount of duties was final and conclusive, and the importer had no right to maintain suit to recover duties alleged by him to be illegal, except after complying with the conditions of protest and appeal imposed.

In *Arnson* v. *Murphy* (1885) 115 U. S. 579, 584, it is said:

> It is incumbent upon the importer to show, in order to recover, that he has fully complied with the statutory conditions which attach to the statutory action provided for.

In *Saltonstall* v. *Russell* (1894) 152 U. S. 628, p. 633, it is said:

> It was suggested in the brief in behalf of the importers, "that the collector had no jurisdiction or power to assess a duty upon the coverings: the liquidation was void, just as if the collector undertook to assess a duty upon domestice goods: the appraisement was void; and in such a case section 2931 of the Revised Statutes does not apply, and no protest is necessary, because there has been no valid liquidation." * * * In *Oberteuffer* v. *Robertson* (116 U. S. 499) it was distinctly recognized that the proper remedy of the importer was by protest and appeal; and the statutes, as has already been seen, make such protest and appeal essential prerequisites to recovery in an action brought *to ascertain the validity of the demand and payment of duties* and to recover back any excess so paid.

Conversely, if the importer complied with the statutory conditions as to protest and appeal, he might assert, in a suit to recover duties paid, the nonobservance of statutory requirements by collectors or appraisers or lack of power to act, or other illegality of liquidation.

> *Oelbermann* v. *Merritt* (1887) 123 U. S. 356.
>
> *Muser* v. *Magone* (1894) 155 U. S. 240, 247.

When the customs administrative act of June 10, 1890 (26 Stat. 136), was enacted, sections 14 and 15,

providing that the collector's liquidation should be final and conclusive unless protest and appeal were taken to the Board of General Appraisers, and in certain cases appeal to the Circuit Court, were a substantial reproduction of the act of 1864 and the Revised Statutes (changes being made chiefly in the tribunals to which appeals should be taken from the collector's liquidation).

See esp. *United States* v. *Spingarn Bros.*, Ct. Cust. App., Dec. 15, 1913 (Treasury Decisions 34002, p. 665).

These sections 14 and 15 of the act of 1890 were amended by the tariff act of August 5, 1909 (36 Stat. 100), section 28, subsections 14 and 29, by enlarging the grounds of appeal to the court and by instituting the United States Court of Customs Appeals.

It will be seen, therefore, that since 1864, for fifty years, there has been a continuous and practically unchanged system of procedure whereby the importer might test the validity of the action of customs officials.

Failure to avail himself of the means pointed out by the customs administrative act of 1890, section 13, renders unmaintainable an importer's suit based on an alleged illegally conducted appraisement.

Schoenfeld v. *Hendricks* (1894) 152 U. S. 691.

Failure to avail himself of such means also deprives an importer of the right to question in defense the legality of the collector's action in a suit by the Government.

> *United States* v. *Strauss* (1893) 55 Fed. 388.
>
> *Gandolfi* v. *United States* (1896) 74 Fed. 549 (C. C. A. 2d Circ.).

And in *Dooley* v. *United States* (1901) 182 U. S. 222, 225, it is stated:

> By the customs administrative act of 1890 * * * an appeal is given from the decision of the collector "as to the rate and amount of the duties chargeable upon imported merchandise" to a board of general appraisers, whose decision shall be final and conclusive "as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duties imposed thereon under such classification" unless application be made for a review to the Circuit Court of the United States. *This remedy is doubtless exclusive as applied to customs cases.*

Not only is the statutory method of questioning the legality of the assessment of duties held exclusive *when the suit is brought by the importer,* but also it is held similarly exclusive when the importer desires to question the legality of duties *in defending a suit brought by the Government.* In other words, where the statute prescribes a form of procedure to an importer who denies the Government's

right to the duty, it matters not whether this denial takes the form of an action brought by the importer or a defense interposed by the importer to the Government's suit.

SUITS AGAINST AN IMPORTER WHILE THE ACT OF 1864 AND THE REVISED STATUTES WERE IN FORCE.

Westray v. *United States* (1873) 18 Wall. 322.

In this case a bond was given by the importer to pay duty on rice as "uncleaned." Later the collector "liquidated" or fixed the duties on the basis of the rice being "cleaned." The United States brought suit on the bond. The importer sought to give evidence in defense that the rice was "uncleaned," and hence that the liquidation was illegal. It was held that as the importer had not complied with the provisions of the act of 1864, section 14, making the decision of the collector final and conclusive unless the importer should within a certain time protest and appeal to the Secretary of the Treasury the defense was inadmissible.

In *United States* v. *Cousinery* (1874) 7 Ben. 251, the defendants paid duty on a preliminary estimate of the goods as dutiable at 25 cents. Later the collector liquidated the duty at $1 and the Government sued to recover the balance. The importer protested, appealed to the Secretary of the Treasury, but did not pay the duty and sue to recover. At the trial the importer attempted to

disprove the correctness of the collector's classification. The court held (p. 255):

> This entirely excludes from consideration in a suit brought by the United States to enforce payment of the duties, all questions as to whether the decision of the collector or that of the Secretary was correct, or as to what duties ought, in the absence of such decision, to have been exacted, and confines the question to be determined in such suit solely to the one *whether the duties claimed to be recovered are those decided by the collector, or by the Secretary, on appeal, to be the proper duties.* This court in such a suit, is, therefore, inhibited from inquiring as to what the collector or the Secretary ought to have decided, or from reviewing the decision of either officer. That power is reserved for the court in which a suit may be brought against the collector, to recover back the duties, *after they shall have been paid.*
>
> These provisions of law maintain and enforce a policy which is found to prevail in the enactments of Congress in regard to raising revenue. The policy is, that the collection of the revenue shall be enforced through summary provisions, and shall not await the slow processes of litigation as to rates and amounts of taxes and duties. A rate is prescribed, an officer is appointed to determine the proper amount, and then that amount must be paid, leaving open a brief time for an appeal. Suits to stay the collection of taxes and duties are not permitted. The very ex-

istence of the Government depends on its receiving its revenue. It collects it, and the aggrieved party is left to a suit to recover back any improper exaction.

In *Watt* v. *United States* (1878) 15 Blatchf. 29, in an action brought by the Government against an importer, Chief Justice Waite held (p. 33):

> This brings up for consideration the only remaining questions, which are, whether the United States were bound, in their action, to go behind the liquidation by the collector, and show that the rate and amount of duties were such as the law required the defendant to pay, or whether, if the liquidation was sufficient to make a *prima facie* case for the Government, the defendant could impeach it by showing that the appraisers failed to perform their duty when appraising the goods. The language of the statute is clear and explicit, to the effect, that the decision of the collector shall be final and conclusive against all persons interested, as to the rate and amount of duties to be paid, unless the appeal is taken. No room is left for construction. The provision is not that no suit shall be maintained to recover back money paid under the decision, until the appeal is taken and acted upon, or the specified time for such action has elapsed, but that the decision itself shall be final and conclusive against all persons interested, upon the questions necessarily decided.

In *United States* v. *Phelps* (1879) 17 Blatchf. 312, in a suit by the Government against an importer, it was held (p. 317):

> * * * On a liquidation the United State is entitled to recover * * * the amount liquidated, as duties, and evidence in such suit, on the part of the defendant, to show that the decision of the collector was wrong, cannot be received. The only remedy of the importer is in a suit to recover back the duties, after paying them in a case where such a suit is allowed by the statute.

Chase v. *United States* (1882), 9 Fed. 883, affirming *United States* v. *Chase* (1879) Fed. Cases 14787, was an action by the Government against an importer.

> It was admitted, for the purpose of the argument, if the facts themselves were competent, that the bagging was in law subject to the lower rate of duty, and that the action of the principal appraiser was irregular because he did not see the goods. But the district judge ruled that the defendant could not set up these facts because they had neglected to appeal to the secretary.

See also *United States* v. *Campbell* (1882) 10 Fed. 816–819.

So in *United States* v. *Earnshaw* (1882) 12 Fed. 283, the duties as estimated by the collector were paid at time of entry; later, on an appraisement, the duties were liquidated at a larger amount and the

Government brought suit. The importer attempted to set up the defense that the collector had failed to comply with the provisions of the statute as to appointing appraisers, and therefore "the appraisement was not in accordance with law and was void"—that *the assessment and liquidation of duties based thereon were erroneous and void.*

The court held (p. 285):

> The averments in the answer do not show a case beyond the scope of the collector's jurisdiction, but obviously a case within it. * * * These * * * amount at most to errors, if errors they were, in the various steps preceding the final liquidation of the duties. Whether the merchant appraiser was as required by statute "a discreet and experienced merchant" or whether any of the other objections made were true in fact, or, if so, were sufficient in law to disqualify the merchant appraiser, were questions which were necessarily to be passed upon by the collector in the first instance (*U. S.* v. *Arredondo*, 6 Pet. 729). * * * The statute which makes the assessment and liquidation of duties final and conclusive, unless specially excepted to by protest and appeal in the manner specified, includes, in my judgment, all the preliminary steps which arise within the collector's lawful jurisdiction to determine, and upon which the ultimate liquidation rests.

It is also said (as a dictum, the point not being involved) p. 285:

> If the liquidation of the duties in this case had been made without the scope of the jurisdiction of the collector, no action for the recovery of the duties assessed could be sustained; and no protest or appeal would have been essential to the defense; *as, for instance, upon an alleged liquidation of duties upon goods which had never been imported at all.*

This is the precise distinction pointed out in *In re Fassett* (1892) 142 U. S. 479 and other cases cited, *infra,* in this Brief (pp. 38–39). There are expressions in the nature of dicta by Judge Brown in *United States* v. *Thurber* (1886) 28 Fed. 56, which would seem to open a wider field of defense to an importer in a suit brought by the Government. The illustrations used in that case to explain what is outside of the collector's "jurisdiction" can hardly be supported as law, in view of the cases *supra.*

Moreover, it may be noted that even in this *Thurber case* the fact is recognized that the liquidation of the collector is presumptively correctly made as an official act, and if an importer intends to attack it, he must do so *by means of an affirmative answer and can not do so by demurrer.* Thus it is said in that case (p. 57):

> Whenever a suit is brought, based upon such officer's action, it is always competent *by way of defense,* to show that the officer

> has departed entirely from the statute, or acted so contrary to it that his acts are deemed beyond his jurisdiction, and in excess of power; and in such a case what he does in excess of his power is illegal and void, *and may be shown in defense.* * * * If merely erroneous the liquidation will be valid and binding here; but if void, that fact may be shown as a defense.

Later, Judge Brown in *United States* v. *Earnshaw* (1891) 45 Fed. 782, 783, 784 (a later stage of the case in 12 Fed.) stated:

> If the importer wishes to contest his liability for the duties as liquidated, *whether by resisting payment* or by suit to recover back duties paid, he must make his protest and appeal, and that without them, so long as the collector keeps within the scope of his jurisdiction, any mere error on his part cannot be reviewed directly or indirectly. * * * Thus due protest and appeal are the foundation of any right of review, directly or collaterally, in all cases where the collector in his proceedings has not exceeded the limits of his authority and has acted in good faith * * *. *If on the other hand it is intended to defend on the ground of fraud, or willful neglect of a statutory duty, or of excess of statutory authority, the answer must aver facts that show some of these defenses, which this answer does not aver.*

The language of the judge displays confusion of ideas. It is of course untrue that every act of an

officer contrary to law, i. e., in excess or violation of his statutory power, is necessarily outside of his jurisdiction and void. But the necessity of alleging and proving the facts by an affirmative defense is clearly stated and is undoubtedly good law.

SUITS SINCE THE ACTS OF 1890 AND 1909 HAVE BEEN IN FORCE.

Louisville Pillow Co. v. *United States* (1906) 144 Fed. 386 (C. C. A. 6th Circ.).

United States v. *Tiffany & Co.* (1906) 151 Fed. 473 (C. C. A. 2d Circ.).

United States v. *Mexican International R. R. Co.* (1907) 151 Fed. 545 (C. C. A. 5th Circ.).

Gulbenkian v. *United States* (1911) 186 Fed. 133, 135, 136 (C. C. A. 2d Circ.).

Gandolfi v. *United States* (1896) 74 Fed. 549 (C. C. A. 2d Circ.).

See also *United States* v. *Strauss* (1893) 55 Fed. 388.

In the *Tiffany & Co. case* the importer had made entry in 1902 of certain pearls upon which the duty was liquidated at the rate of 10 per cent and duly paid. Within one year the entry was reliquidated on the basis of 60 per cent. The importer duly protested, but did not pay the increase, whereupon the Government brought suit for the recovery of the balance due. Upon the trial the Government objected to the introduction by the importer of any evidence tending to support its claim that the increased duties had been illegally assessed, on the

ground that the decision of the collector was made "final and conclusive" by section 14 of the act of June 10, 1890, unless the importer duly protested and paid the increased duty and went before the Board of three General Appraisers. The trial judge overruled the objection. On appeal, the Circuit Court of Appeals said (p. 474):

> Unless review is secured as provided in the section just quoted, the decision of the collector remains final and conclusive; and it is essential to the securing of such review that the owner, importer, etc., "shall pay the full amount of the duties and charges ascertained to be due." In the case at bar no such payment was made. Therefore the collector's decision never came before the Board of General Appraisers for review. And, since the necessary steps to obtain such review were not taken, such decision was final and conclusive. When, therefore, it appeared upon the trial that the collector had made a decision, reliquidating the duty, the Government became entitled to a disposition of the cause in conformity with such decision without any reference of questions as to rate and classification to the jury, and it was error to refuse the request to direct a verdict in favor of plaintiff for the unpaid duties in the amount ascertained by the collector.

When the case came up again, the court again held (153 Fed. 969) that the trial court should suspend the trial until the importer, who had filed protests but had not followed them up by paying duty

and appealing, by paying the increased duty, could put itself in position to try the question of illegal assessment before the board.

In the *Louisville Pillow Co. case,* an importation of feathers had been entered as "undressed" feathers. The feathers were classified as entered, the duties liquidated at $257.10 were paid, and the feathers withdrawn for consumption. Sixteen days later the surveyor, acting as collector, reclassified the feathers as "manufactured or advanced" and reliquidated the duties at 50 per cent *ad valorem,* or $857, and brought suit to collect the difference, viz, $599.90. The importer did not protest or appeal under section 14 of the customs administrative act, but filed an answer to the suit, alleging that the feathers were in reality "undressed." A demurrer to the answer was sustained by the trial court and affirmed on appeal (p. 388):

> Thus, a special method, with a special tribunal was provided for reviewing questions arising in the classification of goods and the liquidation of duties. The questions are usually technical, requiring special knowledge and experience. The rights of both parties are fully guarded through a final review by the courts.
>
> In this case the importer concedes that, if it had desired to review the decision of the surveyor in the original liquidation, it would have been necessary to protest within 10 days and take the matter before the Board of General Appraisers; but it submits that,

> having paid the duties under the first liquidation and withdrawn the goods, it is not limited by the provisions of section 14, in contesting the validity of the reliquidation. *This is as much as to say that the reliquidation is not in fact a liquidation, but something else; that it has not the force and effect of a liquidation. As we read the statutes, the reliquidation has all the validity of the original liquidation. When made it becomes the liquidation in lieu of the original, and must be treated as such under section 14.* * * *
>
> *We are satisfied that the provisions of the customs administrative act, limiting the right of review, apply to the reliquidation, as well as to the original liquidation.*

See also especially the language of the court in *Gulbenkian* v. *United States* (1911) 186 Fed. 133, 135 (C. C. A. 2d Circ.).

CONSIDERATION OF CASES URGED TO CONFLICT WITH THE ABOVE CONTENTIONS.

It has been urged by the defendant that the cases decided under the following internal-revenue tax act (*Revised Statutes*, sec. 3226) are authoritative decisions in its favor; that in a suit by the Government a taxpayer may contest the validity of the assessment:

> R. S. sec. 3226. No suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, * * *

until appeal shall have been duly made to the Commissioner of Internal Revenue * * *.

Clinkenbeard v. *United States* (1874) 21 Wall. 65.

United States v. *Nebraska Distilling Co.* (1897) 80 Fed. 285 (C. C. A. 7th Circ.).

See also *De Bary* v. *Dunne* (1908) 162 Fed. 961.

In these cases, however, the statute did not provide, as do the customs acts, that the decision of the taxing power " shall be final and conclusive " if no protest and appeal is taken; it simply restricted the taxpayer from suing in court until after appeal to the commissioner. In other words, it applied expressly only to suits maintained by the taxpayer. This is the sole extent to which the doctrine of the *Clinkenbeard case* is to be applied.

So it was held in *Watt* v. *United States* (1878) 15 Blatchf., 29, p. 34, by Chief Justice Waite (who was a member of the court which decided the *Clinkenbeard case*):

> *But, under the internal-revenue law, there is no provision making the assessment of such a tax by the commissioner final and conclusive.* * * *
>
> There is, therefore, a marked difference between the customs-revenue laws and the internal revenue laws, in this particular, *and it may well be held, that, in an action for the recovery of customs duties, the liquidation of the collector is conclusive,* while in an action to recover a capacity tax assessed

> against a distillery, under the internal-revenue laws, the determination of the commissioner whose duty it is to make the assessment, is not. Certainly the last of these propositions is all that was decided in *Clinkenbeard's case.*

And see *United States* v. *Reading Railroad* (1887) 123 U. S. 113, 114:

> The trial proceeded upon the rule established by previous decisions of this court, *that an assessment is not* required by the act, nor, *if made, conclusive upon either party,* and that in an action to recover the tax the controlling question is not what has been assessed, but what is by law due.

There are only two classes of customs cases in which it has been held that suit could be brought by an importer *against* the Government, or that a defense could be maintained by the importer in a suit brought *by* the Government, without showing a compliance with the statutory requirement as to protest and appeal.

(*a*) Cases where denial is made that the goods taxed were imported goods at all.

> *In re Fassett* (1892) 142 U. S. 479.
>
> *De Lima* v. *Bidwell* (1901) 182 U. S. 1, 175.
>
> *Dooley* v. *United States* (1901) 182 U. S. 222, 225.

In such a case, it is held that the customs administrative acts have no application whatever to the subject matter in dispute. In other words, the

collector is entirely without jurisdiction over the subject matter—exactly as if he had attempted to levy an income tax or a dog-license tax on the importer.

Similarly, in a suit by the Government to collect an internal-revenue tax imposed on a bank doing business, it was held that defendant might prove as a defense that it was not doing business as a bank, and the assessment was therefore illegal.

> *United States* v. *Bank of America* (1883) 15 Fed. 730.

Such cases, of course, differ in essential principle from those in which the defect in the tax levy alleged is a failure on the part of the collector to perform in compliance with law a function which was clearly his if performed according to the statutory requirement.

> As to the distinction thus taken see *United States* v. *Hall Coal Co.* (1905) 134 Fed. 1003; *Atlantic Transport Co.* v. *United States,* Ct. Cust. App. Oct. 29, 1914 (Treasury Decisions No. 34872).

(*b*) Cases where the importer, if not allowed to sue, would have no remedy at all. Such was a case in 1887 arising under a peculiar state of affairs out of a gap in remedy not covered by Revised Statutes, sections 2931 and 3011—see *United States* v. *Schlesinger* (1887), 120 U. S. 109. That case has been urged by the defendant in the court below as supporting his theory that he may contest the liqui-

dation in this case without resorting to the method provided by the act of 1909.

The *Schlesinger case is not only* NOT *an authority for such a contention but in reality supports the Government view of the law in this case. The Schlesinger case* was an action to recover a balance of duties found to be due upon a reliquidation, to which the importer pleaded that the increased duties were illegal. The importer was permitted to do this because the Supreme Court held that section 2931 of the Revised Statutes must be construed in connection with section 3011, and that therefore the decision of the Secretary of the Treasury was final and conclusive only when, "after a protest and an appeal, a payment of duties is made *in order to obtain possession of the goods,* and then a suit is not brought to recover back the duties within the times and under the limitations prescribed by section 2931," and that his decision was not final where there was "*a payment of estimated duties,* a *delivery of the goods,* a reliquidation assessing further duties, a protest, an appeal, and a suit against the importers by the United States to recover the further duties."

To the same effect is the case of *Porter* v. *Beard* (1888) 124 U. S. 429.

But if the *Schlesinger case* were in conflict with the other cases, section 3011 is no longer in force, having been repealed by the customs administrative act of June 10, 1890. Furthermore, the importers

in that case prosecuted the statutory remedy of appeal to the Secretary, but did not bring suit themselves against the collector, doubtless because they could not bring themselves within the provisions of section 3011, not having paid the increased duties "in order to obtain possession" of the merchandise, which the court also held was necessary in order to entitle them to sue the collector.

The real ground of permitting the importers to defend when sued for the increased duties was that they had no other remedy; they could not sue the collector under section 3011 because of the above-quoted limitation; they had no right of action independently of such limitation; the duties sought to be recovered were, the court found, illegally imposed; consequently the importers could obtain the benefit of the exemption of the merchandise from the higher rate of duty only by waiting until they were sued and then setting up their defense. Had the statutory remedy applied to their situation, they would clearly not have been permitted to defend.

Analogous to the *Schlesinger case* where the importer was allowed the defense, because otherwise he would have no remedy, are those cases in the District Courts where an importer has been allowed defenses in cases where the Government has sued for duties *without* any liquidation by the collector. In these cases, there being no liquidation at all, the importer may not be restricted to proceeding under

the customs administrative acts which make provisions for protest and appeal only from a liquidation of the collector. (See Brief, *supra,* pp. 18,19.)

GENERAL SUMMARY OF THE GOVERNMENT'S CONTENTION.

The Government contends that where the Board of General Appraisers and the Court of Customs Appeals have jurisdiction, it is exclusive, and the District Court is without jurisdiction, so far as the interposition of defenses which could have been raised in the other tribunals is concerned.

The Board of General Appraisers under the act of 1890 and the act of 1909 have as a matter of fact actually taken jurisdiction of exactly the questions which the importers in this suit seek to raise, viz, the right of a collector to liquidate after a year, and the question whether the Government must prove fraud.

Cassel v. *United States* (1906) 146 Fed. 146.

Neresheimer v. *United States* (1903) 131 Fed. 977.

Klumpp v. *Thomas* (1908) 162 Fed. 853 (C. C. A. 3d Circ.).

United States v. *F. B. Vandegrift & Co.* (1909) 175 Fed. 772 (C. C. A. 2nd Circ.).

United States v. *Goldberg* (1911) 2 Ct. Cust. App. 140.

United States v. *Schwartz* (1912) 3 Ct. Cust. App. 24.

Treasury Decisions 24459, G. A. 5346 (1903).

In *United States* v. *Vitelli* in the Court of Customs Appeals February 10, 1914 (Treasury Decisions No. 34194), the precise defense now urged by the importer in the present case was urged on protest to the collector's liquidation and appeal to the Board of General Appraisers under the act of 1909 and on appeal from the Board to the Customs Appeals Court. The court held in favor of the Government that where a collector reliquidated after one year, having found fraud—

> it was not incumbent upon the Government in the first instance to introduce evidence tending to support the correctness of the reliquidation of the collector, but that in this as in other cases of reliquidation where the collector has acted within his authority it is the duty of the importer to go ahead and by proof overcome the presumed correctness of the collector's action (p. 289.)
>
> (See opinion annexed as Appendix A of this Brief.)

The principle of the foregoing cases, especially of the *Tiffany* and *Louisville Pillow Co. cases,* it seems to the Government, is absolutely decisive of the case at bar. Both were suits to recover balances of duties found to be due upon reliquidation of the entries. In both cases, the importer failed to protest and pay the increased duties and appeal to the Board of General Appraisers, as required by section 14 of the act of June 10, 1890, but sought to show, in defense to the action brought by the Government, that the reliquidations were illegal,

and in neither was he permitted to establish such defense.

The only possible ground of distinction that can be conjured up is that in those cases the reliquidations were made within a year from the date of entry, while in the case at bar the reliquidations were made more than a year after the date of entry. It is clear, however, that there is no legal distinction to be thus drawn. If the action of the collector in reliquidating after a year was not in accordance with the statute, this was a defense to be affirmatively proved by the importer, and could and must be so proved after protest and appeal in the way prescribed by the tariff act of 1909. And, as will be shown in the next point, the action of the collector must be held final and conclusive, unless attacked in the manner provided by the statute, as much in one case as in the other.

POINT II.

The collector of customs in reliquidating an entry, whether within or after a year from the date of entry, is to be presumed, like any other public officer, to have acted properly and within the law, and where his duty imposed by statute or otherwise is discretionary or judicial and not mandatory or ministerial, his action or decision upon the facts is conclusive and cannot be controlled or reviewed by the courts, unless the statute so provides, and then only in the manner provided.

The Government maintains that the complaint in Action No. 1 in setting out an original liquidation

of the goods and later an official reliquidation by the collector, after a year from date of entry, and failure by defendant to pay the reliquidated amount after notice given more than 15 days before suit sets out a good cause of action; and that Action No. 2, which contains the additional fact that the reliquidation was made by the collector "*pursuant to his findings and decisions* that they [the entries], as well as the consular invoices upon the basis of which the said entries were originally liquidated as aforesaid, were false and fraudulent and that the original liquidation and the delivery of the said goods * * * had been affected by and through the fraud of the defendant," likewise sets out a good cause of action.

The Government claims that the additional facts set out in Action No. 2 were not strictly necessary but were inserted as a precautionary measure. If, however, this court shall conclude that Action No. 1 is defective for failure to set out that the reliquidation was actually based on a finding of fraud, then, at least, Action No. 2 sets forth a good cause of action on the principles enumerated in the cases cited *infra*.

The defendant, in support of his demurrer, urges, as the Government understands, that the complaint in Action No. 1 is defective in not alleging fraud and setting forth in what the fraud consisted, inasmuch as in the opinion of the defendant, through the operation of section 21 of the act of June 22, 1874, these allegations are requisite in a suit

brought by the Government on a liquidation made after a year from entry. The defendant urges that Action No. 2 is defective in not setting out the particulars of the fraud. In both actions, the defendant contends that the Government must establish the fraud in its affirmative case.

This very contention, however, is expressly overruled in a recent case decided by the United States Court of Customs Appeals, February 10, 1914.

> *United States* v. *Vitelli* reported in Treasury Decisions No. 34194 (copy of the opinion being annexed to this Brief as Appendix A).

In that case, on protest to a reliquidation made after a year from entry for fraud, the Board of General Appraisers sustained the protest on the ground that—

> (*a*) in the hearing before the Board the Government had not supported the claim of fraud by proof;
>
> (*b*) that it was incumbent upon the Collector to establish this fraud by competent evidence;
>
> (*c*) that a presumption of fraud could not arise from the official action of the Collector in reliquidating the entries.

On appeal, the court overruled the Board of General Appraisers and held directly to the contrary of (*b*) and (*c*), stating (p. 286, 289):

> The very authority to liquidate, which resides in the collector alone, implies an au-

> thority to ascertain facts, * * * each of which as well as other findings are necessarily implied in the liquidating act and all of which, if protested against, may be challenged upon the hearing of the protest. The entire subject matter of reliquidation is within his jurisdiction, and the power to determine the existence of the facts necessary to warrant the same inheres in him. * * *
>
> We are of opinion, for the reasons hereinbefore set forth, that it was not incumbent upon the Government in the first instance to introduce evidence tending to support the correctness of the reliquidation of the collector, but that in this as in other cases of reliquidation where the collector has acted within his authority it is the duty of the importer to go ahead and by proof overcome the presumed correctness of the collector's action. Until this is done, it is prima facie correct.

On this case the Government relies. It overrules the decision of the Board of General Appraisers in *Treasury Decisions* 32996, G. A. 7409, *in re Zucca.* As it was decided Feb. 10, 1914, it is also to be regarded as overruling the decision of Coxe, circuit judge, in *United States* v. *Federal Sugar Refining Co.* 211 Fed. 1016, rendered February 20, 1913, in the District Court for the Southern District of New York.

In that case, the Government sued on a reliquidation made after a year from date of entry (the complaint containing substantially the same allegations

as in Action No. 2 in the present case). The court's opinion is short and presents none of the detailed consideration of the law which the court in the *Vitelli case* gave. In fact, the court seems to have clearly misstated the question involved, saying:

> The question presented by the demurrer is whether the collector's decision that the original entries were fraudulent is final and conclusive. * * *
>
> If the collector be the sole and final arbiter, he is invested with autocratic powers. At any time he may, by the mere assertion that he has found an entry which is fraudulent, reliquidate it without a particle of proof, and the victim is remediless. * * *
>
> If the findings and decisions of the collector are final, there is no answer that the defendant can make, even though he can prove conclusively that no fraud existed.

Of course this is not an accurate statement of the position for which the Government contended in that case or contends in this. Its position is that the collector's finding of fraud is presumably correct *until disproved by the defendant*—not at all that his finding is final, "*even though*" the defendant "*can prove conclusively that no fraud exists.*"

It is confidently submitted that this Court will approve and follow the logical reasoning of the court in the *Vitelli case* rather than the inconclusive and inaccurately stated opinion of the court

in the *Federal Sugar Co. case.* The general principle on which the *Vitelli case* rests as a fundament is the well-known doctrine set forth by Mr. Justice Baldwin in *United States* v. *Arredondo* (1832) 6 Peters 691, 729, and as stated in *Arthur* v. *Unkhart* (1877) 96 U. S. 118, 121, 122, by Mr. Justice Hunt:

> These officers (the collector of customs and the Secretary of the Treasury) are, however, selected by law for the express purpose of deciding these questions; they are appointed and required to pronounce a judgment in each case; *and the conduct, management, and operation of the revenue system seem to require that their decisions should carry with them the presumption of correctness. This rule is not only wise and prudent, but is in accordance with the general principle of law, that an officer acting in the discharge of his duty, upon the subject over which jurisdiction is given to him, is presumed to have acted rightly.*
>
> The case may be likened to that of a sheriff who levies upon the property of a debtor who claims that a portion of it is exempt from seizure upon execution. * * * Both the sheriff and the collector have power to act in the first instance upon the question in dispute, and *he who insists that such action is in violation of law must make the proof to show it.*

See also *Louisiana* v. *McAdoo* (1914) 234 U. S. 627.

So in *Allen* v. *Blunt* (1845) 3 Story 743, p. 745, Justice Story said:

> In short, it may be laid down as a general rule, that, where a particular authority is confided to a public officer to be exercised by him in his discretion upon an examination of facts, of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of these facts.

The principle is well set forth and applied in a case where an appraiser's action was attacked under the tariff act.

> *United States* v. *Frank* (1911) 2 Ct. Cust. App. 239, 242–244.
>
> Official action by a customs officer is presumed to be regularly and lawfully had, and the force of this presumption is not to be passed over lightly, but to be regarded as always present and necessary to be considered when the acts of customs officials are assailed. * * * As the corrollary of this doctrine, one who would set aside the acts of such officials must assume the burden of proving that in fact or in law error has been committed.
>
> * * * It would seem to follow as a consequence of these views that in the absence of an express requirement that the appraiser shall write out such preliminary findings or facts or reasons for his ultimate facts, when he has written down the values he has com-

pleted his appraisement, and at once the law surrounds his act by the presumption that every essential antecedent step has been taken. And as the importers have made no showing of fraud or that the action of the officials was upon a fundamentally erroneous principle, the case is one for the application of the rule laid down by us in *Wolff* v. *U. S.* (1 Ct. Cust. App. 181, T. D. 31217) in that the record, together with the presumptions in favor of the appraisement, are proofs which sustain the action had, provided the appraiser made a report to the collector of his decision as to the value of the merchandise appraised.

See also *United States* v. *Loeb* (1900) 99 Fed. 723, 732.

When it is essential to the right of a public officer to act that a certain state of facts should exist, there is a presumption of the existence of such facts.

United States v. *Schering* (1903) 123 Fed. 65, 66. (C. C. A. 2nd Circ.)

Where the classification of merchandise depends upon the existence of specified characteristics descriptive of its qualities, it is to be presumed in favor of a correct classification that these characteristics were found by the officers of the customs.

United States v. *Rosenwald* (1895) 67 Fed. 323, 328. (C. C. A. 2nd Circ.)

Whenever it is alleged by the importer that the collector has exacted a duty based upon an improper classification of merchandise the

burden of proof is upon him to prove the allegation.

Earnshaw v. *United States* (1892) 146 U. S. 60, p. 67.

No reason is perceived for excluding this board of appraisers from the benefit of the general rule applicable to such officers that some presumption is to be indulged in favor of the propriety and legality of their action.

United States v. *Bradshaw,* Ct. Cust. App. Jan. 29, 1914. (Treasury Decision 34168, p. 234.)

It must be conceded that the appraisement of the board of three is conclusive upon all parties, until shown to be contrary to law or based upon some erroneous principle. For the presumption is that the reappraising board acted in accordance with law, and this presumption obtains until the contrary is lawfully made to appear.

See also *Pickhardt* v. *United States* (1895) 67 Fed. 111, p. 113 (C. C. A. 2nd Circ.).

Erhardt v. *Schroeder* (1894) 155 U. S. 124.

Muser v. *Magone* (1894) 155 U. S. 240, 251.

It is of course true that the *finding* or *action* of the officer, which is presumed to be correct, must not be arbitrary and based on no evidence.

Interstate Commerce Commission v. *Louisville & Nashville R. R.* (1913) 227 U. S. 88, p. 92.

In that case, the question whether the Commission's finding was such was decided not on de-

murrer *but after answer and trial.* It may be admitted for the purposes of this case that such an official finding or action, if arbitrary, might be attacked here and overthrown *on proof of that fact by a defendant;* but until overthrown, the presumption of official regularity supports it. It can not be urged, however, that the affirmative duty is cast on the Government, when it institutes suit based on an official act or finding, to negative a contention that such act was arbitrary. Equally unnecessary, therefore, should it be for the Government to prove in the first instance the facts on which finding of fraud was based.

The well-established and fundamental principle relative to acts of public officers above set forth has been specifically applied by the courts to the special act of the collector of customs in reliquidating an entry within a year from its date—in the cases cited *supra.* Is there any reason why the same principle should not apply when the collector reliquidates more than a year after entry? For the ground of reliquidation may be the same in either case, viz, fraud.

The defendant asserts that some mystic quality contained in section 21 of the act of June 22, 1874, chapter 391 (18 Stat. 186) (which act was entitled "An act to amend the customs revenue laws and to repeal moieties") requires a different form of procedure. It is submitted that no such effect can be extracted from the wording of that section—

> That whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, *in the absence of fraud,* and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

Before considering the effect of the act of 1874, it is important to realize some of the various grounds on which a collector could reliquidate prior to 1874.

(*a*) He could change his decision as to classification of the goods, as to their real character and description, etc.

(*b*) He could change his decision as to the rate of duty to be imposed.

(*c*) He could change his decision as to dutiable costs and charges. (See especially *United States* v. *Spingarn Bros.* Ct. Cust. App. Dec. 15, 1913; Treasury Decisions 34002.)

(*d*) He could change his decision as to exchange value of coins on which the estimate was based.

(*e*) He could order a reappraisement by the appraisers.

(*f*) He could change his decision on an amended return of weights made by the weighers under Customs Regulations.

(*g*) He could change his decision as to the amount of the duty.

Any one of these changes he could base upon fraud or upon mistake of law or upon mistake or error of fact in matter of rate or classification, or upon mistake or error or fraud as to appraised value rectified by the appraisers on a reappraisement by them, or upon mistake or error or fraud as to weights returned by the weighers and rectified in an amended return, or mistake, error, or fraud in ascertaining the amount of duties.

In either case, in making the reliquidation the duty was cast upon the collector of determining whether or not there had been fraud or whether or not there was a mistake or whether or not a reappraisement by the appraiser should be asked by him or whether or not an amendment of the weigher's return should be asked, and of course such determination was to be based on evidence and not made arbitrarily.

The collector, however, was never in any case required to justify his action in reliquidating by producing the evidence on which he acted, or by indorsing upon the entry the nature of the evidence, or by making any formal statement of the ground on which he reliquidated. It was sufficient for him simply to state that he had reliquidated the duties,

and now estimated them at a certain fixed sum. The defendant in his brief in the court below said:

> If the collector have the power to reliquidate either within or beyond the year upon the ground of fraud, it must be in a limited class of cases and that condition of fraud must be alleged which establishes his jurisdiction.

This is clearly not an accurate statement of the law; for no case has ever held that a collector in making a reliquidation *within a year* after entry was obliged to allege facts showing fraud which "established his jurisdiction." His jurisdiction to liquidate was established by virtue of his very function as collector. As was said in *United States* v. *Vitelli, supra:*

> The entire matter of reliquidation is within his jurisdiction and the power to determine the existence of the facts necessary to warrant the same inheres in him.
>
> * * * It must always be kept in mind that in this case the statute makes no provision for the finding by any other tribunal other than the collector of the existence of facts which warrant his action, and that in this case he has not, as is ingeniously argued, simply *claimed or asserted* that fraud exists, but on the other hand he has, as he must have done, *found* the existence of fraud.

And see especially the language of the court in *United States* v. *Frank* (1911) 2 Ct. Cust. App. 239, cited *supra.*

Such being the collector's power before 1874, how did the act of June 22, 1874, section 21, on which the defendant relies, change this power?

The Government answers that so far as a reliquidation was made because of a finding of fraud, the statute changes the collector's power not a jot.

When he reliquidates when fraud is present, whether within the year or after the year, he must determine whether there was fraud, and his determination will not be presumed to be arbitrary or without evidence therefor. And neither within the year or after the year, in reliquidating in case of fraud, is the collector required to justify his action by producing or stating the evidence on which he acted or even by setting forth that he had found fraud.

As, after a year, the collector, in the case at bar, could reliquidate only after having found fraud, the Government asserts that the law is clear that the usual presumption must be made that an official on whom a duty is prescribed has properly performed that duty; and the fact of reliquidation being set forth in the complaint in this suit and established by proof, it will be incumbent on the importer to allege and prove that the collector has failed to perform his duty, i. e., either that he has not found fraud or that there was in fact no fraud.

In other words, the single effect of the statute of 1874 is to make a liquidation conclusive after one year only when made in cases other *than those*

in which fraud is present or where a protest is pending. Hence, if the defendant contends in the case at bar that the time limit applies, it must allege and prove that the facts are such as to bring the time limit into play.

DEFENDANT'S CONTENTIONS AS TO JURISDICTION.

No word in the science of law has been worked harder than the word "jurisdiction." It has been made a catchall in which are packed many varied meanings. When this word is used in any brief or decision, its environment must be carefully scrutinized. The defendant claims that the collector was *without jurisdiction* to reliquidate. If he means by this that the collector had no power to liquidate "in the absence of fraud" and that the defendant may show in his proof the facts which establish this defense, there is, of course, no question as to his correctness.

If, however, he means that the United States must in its complaint set out all of the facts as to fraud which alone, in the defendant's mind, establishes a power in the collector to liquidate, he is clearly wrong.

The defendant fails to distinguish between "jurisdiction" used in the sense of *general official power over subject matter* appearing on the face of the record, the faithful performance under which power may be a matter of legal presumption, and "jurisdiction" used in the sense of *actual power under the circumstances* to perform the act which is

contested, the existence of which power must finally be proved on the whole case, but lack of which power need not be negatived in the first instance by the plaintiff.

It may be noted that if fraud were a "jurisdictional fact" and if every collector's liquidation were void and without jurisdiction which did not set forth in the record the facts proving the fraud on which the liquidation was based, the United States Court of Customs Appeals could not take jurisdiction of a case in which the record failed to show such facts. Yet that court *has* taken jurisdiction of exactly such a case (see *United States* v. *Vitelli et al., supra*); and the Board of General Appraisers had also taken, previously, jurisdiction in a similar case. (See *In re Zucca,* Treasury Decisions 32996 G. A. 7409.)

The case at bar does not resemble that class of cases typified by *Interstate Commerce Commission* v. *Northern Pacific Ry.* (1910), 216 U. S. 538, where the original grant of power was based upon a condition or proviso that for its exercise a certain state of facts must exist. The court held these facts to be "jurisdictional." But it is apparent that what was meant was that on the whole case the question whether the facts existed must be proved:

> We are of opinion then that the Commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existence of such a route *may be inquired into by the courts* (p. 544).

Nothing in the opinion can be construed to mean that, in a suit brought by the Government, all the facts would have had to be set forth justifying the action of the Commission. In that case, also, it is to be noted that no statute, as in the case at bar, made the judgment of the Commission "final and conclusive" unless protested and appealed from in a manner provided by statute.

In the case at bar, fraud is a "jurisdictional fact" in the sense only that if, on the whole case, the defendant succeeds in proving the "absence of fraud," then he will have proved that the collector was without authority, and therefore without "jurisdiction," in that sense, to act.

The different uses of the word "jurisdiction" are shown in—

(*a*) Cases like *In re Fassett* (Brief, pp. 31, 38–39 *supra*) where the liquidation was held to have been made with regard to a subject matter over which the collector had no authority; it was therefore absolutely void, and not even presumptively valid or conclusive until attacked by protest under the tariff act.

(*b*) Cases like the *Vitelli case,* where the liquidation was made on a subject matter over which the collector had general authority; it was held presumptively valid as his official act until the defendant should prove that it was not made in compliance with the law.

If there is general jurisdiction in the class of cases involved and the tribunal has judicially de-

termined that the case is within it, an error in the decision does not make it a void decision. The distinction is clearly pointed out in *United States* v. *Schurz* (1880), 102 U. S., 378, p. 401.

> It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent showed issue for land in the State of Massachusetts, where the Government never had any, it would be absolutely void * * *. Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons which include it within the limits of an incorporated town. * * * It was a question for the land officers to consider and decide before they determined to issue McBride's patent. *It was within their jurisdiction to do so.* If they decided erroneously, the patent may be avoidable but not absolutely void.

See also *Noble* v. *Union River Logging R. R.* (1893), 147 U. S., 165, pp. 173, 174.

> Facts "quasi jurisdictional * * * where the want of jurisdiction does not go to the subject matter or the parties *but to a preliminary fact necessary to be proven to authorize the court to act* * * *. In this class of cases if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding. And even if the court be imposed upon, by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose."

The Government maintains, in the case at bar, that having general jurisdiction of the subject matter the collector's act of reliquidating will be presumed legally performed (*i. e.*, performed under the circumstances under which he could legally liquidate) until proof to the contrary is adduced.

> *Revised Statutes*, sec. 2621:
>
> At each of the ports * * * it shall be the duty of the collector * * *
>
> Third. To receive the entries of all ships or vessels and of the goods, wares, and merchandise imported in them.
>
> Fourth. To estimate, * * * the amount of the duties payable thereupon, indorsing such amount upon the respective entries.
>
> *Act of August 5, 1909*, sec. 28.
>
> Subsection 13: * * * And the collector or the person acting as such shall ascer-

tain, fix, and liquidate the rate and amount of the duties to be paid on such merchandise, and the dutiable costs and charges thereon according to law.

Subsection 14: That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges and as to all fees and exactions of whatever character (except duties on tonnage) shall be final and conculsive, etc. * * *

See in this connection the principles of law laid down as to liquidation and reliquidation, *supra* pp. 15–20.

The defendant seeks here to assert a right to have the collector's first liquidation regarded as "final and conclusive" after the expiration of the one-year period. This is clearly matter of answer, not matter of jurisdiction. A reliquidation may be barred by the operation of the statute after one year "in the absence of fraud," but such a bar of statutory time limitation does not impose upon the Government the duty of alleging and proving in the first instance all the facts necessary to negative the existence of such a bar. Failure to act within the statutory time, even if appearing on the face of the record in a plaintiff's declaration, must be taken advantage of by a defendant by affirmative plea or answer.

The defendant interprets the Act of 1874 as if it were a statute dealing for the first time with the subject and from which the collector derived his

original power to act, i. e., as if it was the original grant of authority and read:

> The collector may reliquidate only if there has been fraud.

Whereas it actually does read:

> Such settlement of duties shall after the expiration of one year * * * in the absence of fraud * * * be final and conclusive.

In other words, as stated above, it is a statute granting to an importer a right which he may assert, i. e., a right to have the collector's liquidation held final if he (the importer) can prove that fraud was absent. It is not a statute granting to the Government a power which did not before exist and the conditions of the exercise of which it must allege and prove, in a suit for duties.

On the question as to jurisdiction, see—

> *Fauntleroy* v. *Lum* (1908), 210 U. S., 230, p. 235.
>
> *Anglo-American Provision Co.* v. *Davis Provision Co. No. 1* (1903), 191 U. S., 373, p. 375.
>
> *Ex parte Reed* (1879), 100 U. S., 13, p. 23.

For the purpose of argument it may even be assumed (although not agreed to by the Government as stating the law) that the position taken by the defendant in his brief in the court below is correct—namely that a collector who had failed to avail himself of the remedy to appeal to reap-

praisement under section 13 of the tariff act could not reliquidate an entry "at an advanced value whether within or after the expiration of the year and whether or not upon the ground of fraud"; that "his action would be an absolute nullity," the collector not being an appraising officer; and that his action would be open to collateral attack. This may all be so, and yet the complaint in this suit may be good as a matter of pleading. For while the defendant, on the above theory, might *after answer and in his defense* prove that the collector had attempted to perform the obnoxious action, i. e., to raise the appraised value himself without regard to action by the appraising officials, yet until the defendant affirmatively asserted and proved this defense, the general principle of a presumption of correctness in the collector's action, i. e., his liquidation, would still prevail until overcome by proof.

It may also be admitted, as argued in the defendant's brief in the court below, that (leaving out of question the element of the time)—

> the power to reliquidate is limited by the scope of the collector's general powers, and that he could not reliquidate upon the ground of fraud in those instances where a reliquidation would not be justified in the absence of fraud.

But it is also undeniable that where he had the power to reliquidate for fraud *before* the lapse of

one year, he retains the same power *after* the lapse of one year; and the form of his action is not required to be different in the latter case than in the former. In both cases, the presumption as to the regularity of his performance of his official duty will control until successfully overcome by an importer in proving his affirmative defense.

POINT III.

The act of June 22, 1874, section 21, is a statute of limitation. It can be taken advantage of by importer only by means of a plea or answer, as a matter of defense.

That the statute on which the defendant relies is a statute of limitation has been pointed out *supra* in this Brief. (See pp. 19–20.)

Therefore, even if the Government's complaint shows on its face that the statutory period within which the act must be done has expired, the defendant may not avail himself of this defense on a demurrer.

The statute does not fall within that class of statutes which create a new legal liability with a right to its enforcement within a certain time affixed, and hence does not fall within the doctrine laid down in *Stern* v. *La Compagnie Générale Transatlantique* (1901), 110 Fed., 996, and in *The Harrisburg* (1886), 119 U. S., 199, 214, where it is said:

> The statutes create a new legal liability with the right to a suit for its enforcement

provided the suit is brought within twelve months and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created and not of the remedy alone. It is a condition attached to the right to sue at all.

* * * *The liability and the remedy are created by the same statutes* and the limitations of the remedy are therefore to be treated as limitations of the right.

Partee v. *St. Louis & San Francisco R. R. Co.* (1913), 204 Fed., 970 (C. C. A. 8th Circ.).

A statute which in itself creates a new liability gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. (P. 972.)

Stitzer v. *United States* (1910), 182 Fed., 513 (C. C. A., 3rd Circ.).

To call the statute in question a limitation is not only a misnomer, but an absolute misconception of the purpose of the act, which was to give any person or persons, supplying labor and materials to a contractor with the Government, a right of action, *where before none existed.* The act was not intended to, and does not, bar any cause of action, but rather creates one. (P. 516.)

Unlike the statutes in the above cases, the act of 1874 simply imposed the bar of a time limit to the exercise of a power (and the right to maintain a suit based on such exercise) which already existed and which had existed for over seventy-five years.

In the case of *De Bary* v. *Dunne* (1908), 162 Fed., 961, the plaintiff sued the collector of internal revenue to recover taxes alleged to have been erroneously exacted. Here, too, the suit was based upon a statute prescribing conditions upon which the Government would permit itself to be sued, and the court held that full compliance with the conditions of the statute creating the right of action and giving permission to sue must be shown by the plaintiff. The case is wholly out of point here as authority for the construction of the act of 1874, section 21, which creates no right of action and merely limits the exercise and enforcement of a right already existing.

That the question of whether the reliquidation is made within the statutory limit of one year is not a question of jurisdiction may be seen from the case of *United States* v. *Spingarn Bros.*, Ct. Cust. App. Dec. 15, 1913 (Treasury Decisions No. 34002), in which case the validity of a reliquidation was considered but as stated in the decision, " it is stipulated in the record that the time of the reliquidation being more than one year after the original liquidation shall not be here made an issue." If a question of jurisdiction of subject matter was in-

volved, however, it could not be waived. The fact that the court proceeded to decide the case on the merits, and allowed the waiver of the defense of the time limitation clearly shows that the court did not consider the latter as jurisdictional.

POINT IV.

The objection that the rule contended for by the Government casts upon the importer the burden of proving a negative; i. e., the absence of fraud in the original entry or liquidation, is not a sound one. Such a burden is often cast upon one of the parties to a legal controversy.

This objection was considered and answered by the United States Court of Customs Appeals in the *Vitelli case:*

> It should be noted that the statute, section 21 *supra,* excepts from the operation of its limiting provisions the following cases: First, where the year has not elapsed from the payment of the original liquidated duties and the delivery of the merchandise; second, where there is fraud; and third, where protest has been made. In other words, in the presence of any one of these conditions the bar of the statute does not apply and their nonexistence is necessary to permit the liquidation to be final and conclusive upon all parties.
>
> To obtain the benefit of the provision for finality of the first liquidation, in such a

> statute, it seems that any person who seeks to impeach a reliquidation must aver and prove the nonexistance of the statutory exceptions. * * * (at page 82–83 of Brief).
>
> That this may involve the proving of a negative on the part of the importers does not affect the question, for in *Arthur* v. *Unkart,* 96 U. S., 118, a leading authority upon the proposition that the acts of public officers acting within the scope of their authority are presumed to be correct, it is clearly recognized and cases are cited to the proposition that the support of a negative allegation often devolves upon parties who challenge the correctness of such official action. * * * (at page 81 of Brief).

This burden is by no means unjust to the importer defendant. If fraud exists in customs matters the facts and the evidence of it are all peculiarly within the knowlege of the importer—he is in a more favorable position to know as to the existence of private papers, letters, weights, means of fraudulent imposition, etc., than is the Government; and there is no hardship in requiring him to clear himself or to prove illegality of the collector's action when the Government official has found prima facie evidence of fraud. Instances of requiring a party to prove absence of fraud or other negative are not uncommon. An illustration of such a requirement is the case of *Austrian* v. *Laubheim* (1909) 78 N. J. L., 178, 180, 181, in the Supreme

Court and unanimously affirmed in 1910 upon its opinion by the Court of Errors and Appeals (Chancellor Pitney, now Justice Pitney, being one of the court) in 80 N. J. L., 459.

> A plaintiff who has held a defendant to bail for fraud in the inception of the contract is entitled, as of course, to a *ca. sa.* in execution of any judgment he may recover in the action, *unless the defendant on the trial sustains the burden of showing absence of fraud* * * *. (78 N. J. L., p. 181.)

See also *Colorado Coal & Iron Co.* v. *United States* (1887), 123 U. S., 307, p. 317:

> *Snow* v. *Weeks* (1883) 75 Me., 105, 107.
> *Horner-Gaylord Co.* v. *Miller & Bennett* (1906), 147 Fed. 295, 303.

Instances of statutes shifting the burden of proof so as to require proof of a negative are frequent.

> *Allen* v. *Hawks* (1831), 11 Pick., 359.
> *Holmes* v. *Hunt* (1877), 122 Mass., 505.
> *Railroad* v. *Crider* (1892), 91 Tenn., 489, per Lurton, J.

CONCLUSIONS.

Question 1 should be answered by holding that the remedy provided by the customs administrative act (act of June 10, 1890, and act of Aug. 5, 1909, 26 Stat. L., 136, and 36 Stat. L., 100), viz, of protest, payment of the full amount of duties ascertained to be due upon the reliquidation and

appeal to the board of general appraisers, and thence to the courts, is the only way in which the defendant may attack the validity of the reliquidation.

Question 2 should be answered in the affirmative.

Question 3 should be answered in the affirmative.

CHARLES WARREN,
Assistant Attorney General.

November, 1914.

APPENDIX A.

(T. D. 34194.)

Reliquidation.

UNITED STATES *v.* VITELLI & SON (No. 1084).

1. SECTION 21, ACT OF 1874.

There is no limitation fixed by section 21, act of 1874, except a limitation which arises only in the absence of fraud and in the absence of protest. So far as the section contains implied authority for reliquidation, it imports the right to reliquidate in case of fraud and in case of protest after the lapse of one year equally with the right so to reliquidate within the period of a year.

2. RELIQUIDATION—FRAUD—BURDEN OF PROOF.

The collector found the existence of fraud as a fact. It was not incumbent on the Government in the first instance to introduce evidence tending to support the correctness of the reliquidation by the collector on the ground of fraud. In this case, as in others, the burden was placed on the importer to show by proof that the collector's action was erroneous.

United States Court of Customs Appeals, February 10, 1914.

APPEAL from Board of United States General Appraisers, G. A. 7418 (T. D. 33115).

[Reversed.]

William L. Wemple, Assistant Attorney General, for the United States.

Albert M. Yuzzolino for appellees.

James M. Beck and *Joseph W. Carroll*, *amici curiæ*.

70458—14——6

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

In 1905, 1906, and 1907, 14 separate entries were made by the importers of chestnuts and garlic. Liquidation was had by the collector and the duties imposed paid. On July 8, 1912, an order was made by the collector stating that satisfactory evidence having been produced showing that the returns of weights on the importations in question were false and fradulent, the liquidations were declared void and a reliquidation directed on the basis of the corrected returns made by the United States weigher. The reliquidation was had and protest was filed with the collector and an appeal taken to the Board of General Appraisers, which sustained the protest on the ground that in the hearing had before the board the Government had not supported the claim of fraud by proof, and that it was incumbent upon the collector to establish this fraud by competent evidence, and that a presumption of fraud could not arise from the official action of the collector in reliquidating the entries. From this decision the Government took an appeal to this court.

Subsequently to the hearing a brief has been filed by permission of counsel intervening *amici curiæ*, and the contention is made in this brief that while the Board of General Appraisers reached the correct conclusion, it was in error in assuming that the collector, in reliquidating after the lapse of a year, acted in the discharge of a right granted or duty imposed by law, and that no reliquidation can be had after the lapse of one year.

The board construed section 21 of the act of 1874 as authorizing a reliquidation at any time during one year from the time of entry, and as also authorizing a reliquidation after the lapse of one year in case of fraud or in case of a pending protest.

This section provides:

> That whenever * * * duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner * * * such entry and passage free of duty and such settlement of duty shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

This section is to be construed in connection with subsection 14 of the act of August 5, 1909, which provides:

> That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within 15 days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within 15 days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. * * *

This section was enacted in lieu of section 2931 of the Revised Statutes, which, as it relates to the ques-

tion here involved, was in substantially the same terms. That section provided that—

> On the entry of any * * * merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid * * * on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner * * * importer, consignee, or agent of the merchandise * * * shall, within 10 days after the ascertainment and liquidation of the duties by the proper officers of the customs * * * give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within 30 days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury.

These two provisions were first considered by the courts in 1879, and in an opinion by Blatchford, Circuit Judge, in *United States* v. *Phelps et al.* (17 Blatch. 321; Fed. Cas. No. 16039), it was said:

> By section 2931 of the Revised Statutes the decision of the collector, in liquidating duties, as to the amount of duties on imported goods, is made final and conclusive against all persons interested in such goods, unless notice in writing of dissatisfaction with such decision is given to the collector, by the importer, within 10 days after the liquidation, and unless within 30 days after the liquidation there is an appeal by the importer from the liquidation to the Secretary of the Treasury. Such liquidation is not made final and conclusive as against the United States. There is nothing in the section which forbids a reliquidation or a new decision by the collector, even after the payment of all the duties fixed by a proper liquidation, or even after the refunding of money deposited beyond the amount of duties so fixed; or which forbids a new decision by the collector as to the law on the same facts, or a new decision as to facts, based on additional or new or different facts. This view

is confirmed by the enactment of section 21 of the act of June 22, 1874 (18 Stat. 190), which is as follows:

> Whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

This provision was in force when the transactions in this case took place. It applies to the United States. The expression "all parties" includes the United States. By section 2931 of the Revised Statutes there was no limitation imposed on the power of the collector to reliquidate when such reliquidation was in the interest of the Government. But by section 21 of the act of 1874 a limitation is imposed on such power, so that, after the entry of goods and after the liquidation and payment of duties on them, and after the delivery of the goods to the importer, such settlement of duties, if there be no fraud and no protest by the importer, is, after one year from the entry, final and conclusive, even as respects the Government. In the present case the suit was brought before the one year expired. The collector, therefore, had power to make the reliquidation of July 20, 1878. * * *

This case has not only been frequently followed, but the paragraph providing as to cases in which the first liquidation of the collector shall be final has been twice reenacted and is now embodied in subsection 14 above quoted.

The cases which recognize and follow the case of *United States* v. *Phelps* are some of them referred to in *Hawley & Letzerich* v. *United States* (3 Ct. Cust. Appls. 456; T. D. 33037), and are collected in the case *In re Forbes & Wallace* (T. D. 23655) there cited. See also *Louisville Pillow Co.* v.

United States (144 Fed. 386) and *United States* v. *R. R. Co.* (151 Fed. 545).

The effect of these decisions, and particularly in view of the reenactment of the provisions now embodied in subsection 14, is to establish the rule that the first liquidation of the collector is not conclusive upon the United States; that in the absence of limitation a reliquidation may be had at any time; and that the only limitation is contained in section 21 of the act of June 22, 1874, which by implication also recognizes the right to reliquidate after the first liquidation is had.

The cases in which the question had arisen were cases in which the liquidation occurred within the one year's period fixed by the statute of 1874. But it is obvious that the power to reliquidate is precisely the same in any one of the three instances mentioned in that section. The limitation is that reliquidation shall not occur after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner, importer, agent, or consignee. So if a reliquidation may be had at any time within one year, by the same authority if fraud exists or if a protest is had, a reliquidation may take place after the year. Or to state it in another way, there is no limitation fixed by section 21 except a limitation which arises *only* in the absence of fraud and in the absence of protest. So far as section 21 contains an implied authority for reliquidation, it is equally as forceful in importing the right to reliquidate in case of fraud and in the case of protest after the lapse of one year as it is in importing the right to so reliquidate within the period of one year.

This brings us, then, to a consideration of the question whether when a reliquidation is had after one year it is incumbent upon the Government in case of an appeal to establish that there was in fact fraud before a reliquidation can be justified. That the right to recover these duties against imported merchandise vested in the Government upon the importation is too well settled to require extended discussion. Upon this point see the cases cited, *supra*. And that the power of the collector to reliquidate existed prior to the act of June 22, 1874, is determined by cases cited. See particularly *United States* v. *Calhoun* (184 Fed. 501).

In this case the collector reports that—

> Evidence was produced to show that the returns of the United States weighers were false and fraudulent, hence the liquidations were declared void and reliquidations were made on the true weights, as found on the amended returns of the United States weigher.

The briefs of the importers and *amici curiæ* concede that if the collector proceeded within the authority conferred upon him by statute his acts carry with them the presumption of correctness, but they urge that the collector has no authority to find that fraud exists before he can reliquidate, and hence when his reliquidation is challenged by protest, as in this case, that it is incumbent upon the Government at the hearing before the board to go ahead and establish the existence of the fraud. In other words, they treat the case much as if the appeal here were an appeal from the finding of fraud rather than the reliquidation. Upon this theory, however, until fraud were established it is manifest there could be no reliquidation whatever, because if the collector is without power to find fraud he

can in no case reliquidate on that ground, unless and until it is otherwise found, for which procedure the statute expressly or impliedly makes no provision. In this view there is really no reliquidation here to be challenged by protest.

The conduct of the importers, however, negatives this theory, because they have paid the reliquidated duties under protest, thereby taking the position that there has been a reliquidation, and are now prosecuting a protest for the purpose of having the same set aside and the moneys refunded.

We think it can not be said that this differs from other cases of an appeal from a liquidation of the collector in this respect. The very authority to liquidate, which resides in the collector alone, implies an authority to ascertain certain facts—for instance, to determine whether the goods were imported, whether entitled to free entry or dutiable, each of which as well as other findings are necessarily implied in the liquidating act and all of which, if protested against, may be challenged upon the hearing of the protest. The entire subject matter of reliquidation is within his jurisdiction, and the power to determine the existence of the facts necessary to warrant the same inheres in him. Whether he will reliquidate or not is a matter in which he must exercise his discretion. It will not be presumed that he will without investigation wantonly and without cause exercise the power, but it will be presumed, when the same has been exercised, that it was warranted, and unless appeal is given from such decision, as it is in this case, such action is conclusive and by the statute is made so unless appealed from.

That this may involve the proving of a negative on the part of the importers does not affect the question, for in *Arthur* v. *Unkart* (96 U. S. 118), a leading authority upon the proposition that the acts of public officers acting within the scope of their authority are presumed to be correct, it is clearly recognized and cases are cited to the proposition that the support of a negative allegation often devolves upon parties who challenge the correctness of such official action.

It must always be kept in mind that in this case the statute makes no provision for the finding by any tribunal other than the collector of the existence of facts which warrant his action, and that in this case he has not, as is ingeniously argued, simply *claimed* or *asserted* that fraud exists, but, on the other hand, he has, as he must have done, *found* the existence of fraud. The position taken by both importers and *amici curiæ* here, if adopted, really results in a judicial annihilation of the settled doctrine of the law that the acts of officers of the law upon a subject of which they have jurisdiction are presumed to be correct.

This case is not the institution of a suit by the importers in a court of common-law jurisdiction, but is a special proceeding authorized by statute for the purpose of challenging the correctness of a decision of the collector, which decision is declared final unless appealed from. The importers have no constitutional right to review this decision in the courts. The right to do so is a favor granted to them by the United States.

As was said in the case of *Arnson* v. *Murphy* (115 U. S. 579, 584):

> The right of action does not exist independently of the statute, but is conferred by it. * * * But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested unless certain things are done. The mere exaction of the duties is, necessarily, the decision of the collector, and on this being shown in any suit it stands as conclusive till the plaintiff shows the proper steps to avoid it.

But, if it be assumed that the ordinary rules of pleading observed in civil causes may be invoked here, it should be noted that the statute, section 21, *supra,* excepts from the operation of its limiting provisions the following cases: First, where the year has not elapsed from the payment of the original liquidated duties and the delivery of the merchandise; second, where there is fraud; and, third, where protest has been made. In other words, in the presence of any one of these conditions the bar of the statute does not apply, and their nonexistence is necessary to permit the liquidation to be final and conclusive upon all parties.

To obtain the benefit of the provision for finality of the first liquidation, in such a statute, it seems that any person who seeks to impeach a reliquidation must aver and prove the nonexistence of the statutory exceptions. This rule is fully set forth and discussed in *Lewis's Sutherland Statutory Construction* (vol. 2, sec. 351). See also *Arnson* v. *Murphy, supra.*

The importers here evidently recognized its applicability, because their protest expressly denies the existence of fraud.

The question may be somewhat novel, as it is unusual to require one to prove the absence of fraud which may be imputed to him. The existence of fraud, however, is only incidental to the question

as to the correctness of the reliquidation, and upon that issue the importers meet and must overcome the presumption that it is correct. Tested by the rule of pleading above mentioned the importers have failed to bring themselves within the same by failing to prove their averment that there was no fraud.

There is also another view of the case not discussed by counsel which ought not to be disregarded or overlooked. The original and amended weigher's returns are a part of the files, were before the board, and are before this court. These amended returns and the reliquidation thereon relate only to garlic and chestnuts, while some of the entries, 14 in number, cover in addition other merchandise. Upon these corrected weigher's returns are written statements to the effect that the greater part of the reliquidated merchandise had been traced from the importers to various persons who had weighed the same and kept a record of such weights, with which the weights shown in the corrected returns substantially correspond; that in some instances the merchandise had been paid for upon the basis of such weights; and that in at least one case the importers had billed the goods at 46,253 pounds, which was some 3,500 pounds greater than the weight thereof as originally returned by the weigher. We have examined some of the files relating to all these 14 entries, and therefrom it appears that the corrected returns increase the weights above those originally returned in amounts varying from 1,000 to 16,000 pounds in each of such entries.

We doubt if it can be said that these facts are not evidence of fraud, which, unexplained, would seem to import a deliberate and, for a time at least, suc-

cessful attempt to pass many thousand pounds of merchandise through the customs without paying duty thereon. While it has been, as we understand, uniformly held that the weigher's return is conclusive upon the collector and the Board of General Appraisers where he has acted within the rules of law prescribing his duties, yet if he has fraudulently underweighed merchandise he has not so acted, but has violated not only the law but his statutory oath of office, and his weighing becomes a nullity. For an authority reviewing decisions on this subject see G. A. 6620 (T. D. 28249). It is also there held that where the weight is void or illegal in a particular case the actual weight for dutiable purposes may be determined by evidence *aliunde*.

In the case at bar the first weights have by the proper customs officers been found fraudulent and void, and amended certificates of weight with indorsements showing how the same were ascertained have been filed in the case and submitted to the collector. The collector has satisfied himself, as he says, upon *evidence produced* that the first weights were fraudulent and has reliquidated upon the basis of the weigher's amended returns. These returns and amended certificates are a part of the case and would seem to be sufficient, if it were necessary to show fraud in the first instance, to support the judgment of reliquidation. Thereby importers were put upon notice as to the particular fraud found. They can not claim ignorance, uncertainty, or embarrassment as to what the issue was, and they, better than anyone else, should have knowledge of the facts necessary to meet the same. They were not entitled to a hearing before the collector

upon this question, but could get their day in court by appealing from the reliquidation to the board, as they have done.

We are of opinion, for the reasons hereinbefore set forth, that it was not incumbent upon the Government in the first instance to introduce evidence tending to support the correctness of the reliquidation of the collector, but that in this as in other cases of reliquidation where the collector has acted within his authority it is the duty of the importer to go ahead and by proof overcome the presumed correctness of the collector's action. Until this is done it is prima facie correct and must be affirmed.

The judgment of the Board of General Appraisers is *reversed.*

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INDEX.

CASES CITED.

STATUTES.

In the

Supreme Court of the United States.

OCTOBER TERM, 1914.

The United States vs. Sherman & Sons Company.	No. 841.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR SHERMAN & SONS COMPANY.

Statement of the Case.

In 1909 Sherman & Sons Company imported and entered at the port of New York certain laces, upon which duties were duly liquidated and paid. Four years later, to wit, in 1913, the Collector reliquidated the entries covering these importations, increasing the amount of duties above that found upon original liquidation, and caused these suits to be brought against the

importers for the balance alleged to be due the United States.

The questions of law presented by the certificate from the Circuit Court of Appeals are raised by the demurrers to the Government's complaints.

The vital averments of these complaints are those which set forth the reliquidation made by the Collector more than one year after the entry of the goods. The complaint in Action No. 1 simply alleges the fact of reliquidation, more than one year subsequent to the dates of entry; stating no ground therefor. The complaint in Action No. 2 alleges a reliquidation by the Collector, more than one year subsequent to entry, "*pursuant to his findings and decisions*" that the entries and the consular invoices presented with them were false and fraudulent.

The sufficiency of these complaints must be determined by the general limitations upon the Collector's powers, as hereinafter discussed, and in particular by the interpretation of Section 21 of the Act of June 22, 1874 (18 Stat., 190), providing as follows:

> "That whenever any goods, wares and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares and merchandise shall have been liquidated and paid, and such goods, wares and merchandise shall have been delivered to the owner, importer, agent or consignee, such entry and passage free of duty and such settlement of duties shall, after the ex-

piration of one year from the time of entry, *in the absence of fraud*, and in the absence of protest by the owner, importer, agent or consignee, be final and conclusive upon all parties."

The Contentions of the Defendant.

Under this statute, especially when construed upon a view of the checks put upon the Collector's powers by the system of customs administration as a whole, and of other acts *in pari materia*, the defendants contend:

(1) That the Collector has no right whatever to reliquidate an entry upon the ground of fraud, after the expiration of one year from the date of entry, in any sense which would make his action a "decision" authorized by law and binding upon the importer unless reversed upon protest and appeal.

(2) That if he has that right, then the existence of fraud is an absolute condition of the exercise of the power, is a jurisdictional fact, which must be pleaded affirmatively as a fact; and that this requirement is not satisfied by a pleading which contains no averment of fraud, or by one which alleges merely the Collector's findings of fraud without affirmatively setting up fraud as a fact.

(3) That where the Collector acts outside of his power and jurisdiction as a public officer his decision is a nullity, and the importer is not restricted to the methods of review prescribed by the revenue system, but may plead such illegality by way of

defense in an action brought by the Government for duties, or by way of demurrer where the complaint fails to plead or insufficiently pleads a case within the jurisdiction of the Collector.

This is a case of novel impression.

The exhaustive review of the fundamental principles of customs administration, and the authorities bearing thereon, found in the brief for the Government does not answer the question presented in this case. There is no need for expounding the axiom that the special method and special tribunals provided by law for the correction of the errors of tax officials are exclusive, for, as regards acts within their authority the rule is not disputed. Much that is said with respect to the conclusiveness and presumed regularity of the acts and decisions of collectors and other officers and tribunals having discretionary powers, calls for no discussion, as the general principle is fully acknowledged, and the instances cited are those where the authority employed was expressly conferred by statute.

There is always open, however, the question of power in the officer and the further question whether, given the power, the party relying upon the official act has sufficiently pleaded the conditions which justify its exercise.

In all of the impressive array of authorities cited in behalf of the Government there are only two presenting instances where a collector of customs has under-

taken to reliquidate customs entries upon the ground of fraud (U. S. *v.* Federal Sugar Refining Co., 1913, 211 Fed., 1016; U. S. *v.* Vitelli, Ct. Cust. App., Feb. 10, 1914, T. D., 34194). And the only one of these which is directly in point was decided in favor of the importer (U. S. *v.* Federal Sugar Refining Co., *supra*).

The question is one of novel impression in this court. The present case is brought as a test to determine whether the Collector of Customs, by the mere act of reliquidating an importer's entries, after the running of the limitation fixed by law, and upon his own *ipse dixit* as to fraud, can compel importers to pay into the Treasury practically unlimited sums of money, as a condition precedent to any remedy whatever, or deny them all redress if their available assets do not equal the amount of the Government's demands.

ARGUMENT.

I.

The Collector of Customs is without power to reliquidate an entry upon the ground of fraud after the lapse of a year from the date of entry.

No principle is better settled than that a discretionary power vested in an administrative officer can be exercised only in the manner and under the circumstances prescribed by the statute and that any attempted exercise thereof in any other manner or under different

circumstances is a nullity, and, further, that the exercise of such power is limited to a sound legal discretion, excluding all arbitrary, capricious, inquisitorial and oppressive proceedings.

U. S. *v.* Doherty, 27 Fed., 730.

Bandler *v.* Hill, 146 N. Y. Suppl., 98, 103–104; 84 Misc. Rep., 359.

Tweeds Case, 16 Wall., 504, 518–519.

U. S. *v.* Calhoun, 184 Fed., 499; affd. by C. C. A., 2nd Circt., May 14, 1914, 215 Fed., 709.

1. No statute gives the Collector of Customs power to make findings and conclusions as to the fraud of importers; especially after one year from entry.

It is not pretended that (with the specific exceptions noted below) any statute in force at the time of the passage of the Act of June 22, 1874 (18 Stat., 190), or since enacted, has given the Collector express authority to reliquidate an entry for any purpose whatever. Such power as he had in 1874 was derived from Sections 2621 and 2931 of the Revised Statutes.

Section 2621, so far as material, provided:

> " SECTION 2621. At each of the ports to which there are appointed a Collector, naval officer, and surveyor, it shall be the duty of the Collector; * * *
>
> " THIRD. To receive the entries of all ships or vessels, and of the goods, wares and merchandise imported in them.
>
> " FOURTH. To estimate, together with the naval officer where there is one, or alone where

there is none, the amount of the duties payable thereupon, indorsing such amount upon the respective entries."

Section 2931 provided that "The decision of the Collector * * * as to the rate and amount of duties to be paid * * * on such merchandise * * * shall be final and conclusive against all persons interested therein," and that no suit should be maintained for the recovery of duties until after protest, and appeal to and decision by the Secretary of the Treasury.

The latter provision was substantially re-enacted as Section 14 of the Customs Administrative Act of June 10, 1890 (26 Stat., 137), and Subsection 14 of Section 28, of the Taraff Act of August 5, 1909 (36 Stat., 100), except that new tribunals for the hearing of appeals have been created.

The silence of the statutory law with respect to any general power of reliquidation is significant, in view of the express delegation of that power in certain specific instances.

Thus, less than a year after the Act of 1874, Section 21 of which, it is argued, merely places a restriction upon a hitherto unlimited power, Congress passed the Act of March 3, 1875 (18 Stat., 469) prohibiting the refunding of certain moneys collected as duties unless in accordance with the judgment of a Court, Section 1 of which contained the following proviso:

> "That this act shall not * * * prevent the correction of errors in liquidation, whether

> for *or against* the Government, *arising solely upon errors of fact* discovered within one year from the date of payment.

Manifestly this act authorized a reliquidation within a year to correct errors of fact made *against* the Government in liquidation, but it clearly inhibits the idea of any general power in the customs officers to change an original liquidation upon any other ground or after the lapse of a year.

> 21 Opn. Attorney General, 224.
> *Ib.*, 152.
> U. S. *v.* Leng, 18 Fed., 15, 23.

> This proviso does not authorize are liquidation against the importer except for errors arising solely on matters of fact, and not for an erroneous construction of the tariff law or classification of goods.

Section 24 of the Act of June 10, 1890 (26 Stat., 131, 140), contains the following provision:

> " The Secretary of the Treasury is authorized to correct manifest clerical errors in any entry or liquidation, *for* or *against* the United States, within one year from the date of such entry but not afterwards."

This provision supersedes the proviso of Section 1, Act of March 3, 1875, *supra*, as to manifest clerical errors.

> U. S. *v.* F. B. Vandegrift & Co., 175 Fed., 772, C. C. A., 2nd Circt.

Section 25 of the Tariff Act of 1894 (28 U. S. Stat., 552) authorizes the Secretary of the Treasury to order

the reliquidation of an entry at a different value in certain cases of fluctuation of the value of foreign coins.

U. S. *v.* Whitridge, 197 U. S., 135.

Subsections 13 and 14 of Section 28, Tariff Act of 1909 (36 U. S. Stat., 99-100), authorize the Collector to liquidate the entry in accordance with the decisions of the Board of General Appraisers. This necessarily means *re*liquidation where protests are sustained.

U. S. *v.* Dickson, 139 Fed., 251, C. C. A., 2nd Circt.

It therefore appears that Congress has always been explicit and has in most instances enacted affirmative provisions in conferring the power of reliquidation. The inference is strong that Congress intended to authorize reliquidation only in the cases where the statutes expressly provide for it. In the absence of a statute to the contrary, the general rule applicable to special statutory tribunals would seem to make the Collector's decision irreviewable by himself.

U. S. *v.* Leng, 18 Fed., 15:

> "By the general rule such tribunals, when they have once rendered their decisions, become *functus officio* as to the particular proceeding, and having no longer any jurisdiction of it, cannot recall or reverse their decision. * * * These decisions do not rest upon any statutory provision making the action or decision of such special tribunals 'final and conclusive.' They all proceed upon an inherent want of power in

> such tribunals to recall or modify their judgments when once made and declared; because, having performed their statutory duty, they lose jurisdiction of the subject-matter, and are *functus officio.*"

But notwithstanding the well-settled common law rule, which precludes an inferior tribunal from recalling or reviewing its own decisions, it was held, in United States *v.* Phelps (17 Blatch., 312), a case decided in 1879, construing the provisions of Section 2931 of the Revised Statutes, making the Collector's decision as to the rate and amount of duties final and conclusive 'against all *persons* interested" in the imported merchandise, that the word "persons" did not include the United States, and a reliquidation of an entry, in favor of the Government, made within a year from the time of entry was sustained.

This case and a number of decisions which have since followed it, recognize some implied power or "privilege" in the Collector to reliquidate an entry within the year. It is purely implied, for, as already shown, no statute can be pointed out which gives it, and its precise limitations have never been defined by the Courts.

U. S. *v.* Campbell, 10 Fed., 816, 821:

> "The right to reliquidate is not an absolute right. It is not conferred by any statutory authority. It is a privilege which has been sustained by the courts," etc.

U. S. *v.* Calhoun, 184 Fed., 499, aff'd by C. C. A., 2nd Circt., 1914, 215 Fed., 709:

"The right of the Collector to (re)liquidate is not affirmatively given anywhere, but is recognized by implication in Subsection 14 of Section 28 of the present act, in that he is not concluded by his own liquidation, and in Section 21 of the Act of June 22, 1874, in that the right is limited to one year."

In all of the cases where this privilege has been sustained (except U. S. *v.* Vitelli, *infra*), the reliquidation was made *within the year from the date of entry* and involved an exercise of discretion clearly within the Collector's power under the statutes; that is to say, they were cases involving questions of "classification," or questions of law affecting the rate and amount of duties, such as the Collector must necessarily determine.

For example, in U. S. *v.* Phelps, 17 Blatchf., 312, the Collector, in reliquidating the entry, had allowed a claim of damage to fruit, which upon reliquidation, he disallowed upon the ground that the damage did not exceed twenty-five per cent. as required by law. In the Louisville Pillow Co. case, 144 Fed., 386, feathers originally liquidated as "undressed" were reclassified upon reliquidation as "manufactured or advanced." In the Tiffany case, 151 Fed., 473, the importation was first classified and liquidated as "pearls in their natural state," and, upon reliquida-

tion, classified as "jewelry." In the Mexican International R. R. Co. case, 151 Fed., 545, merchandise originally classified and liquidated as "waste not specially provided for," was, upon reliquidation, classified as "wool waste." In Westray *v.* U. S., 18 Wall., 322, which involved an original liquidation and not a *reliquidation*, the merchandise had been entered as "uncleaned" rice, and was classified upon original liquidation as "cleaned."

In none of these cases was any question of fraud involved, or any question raised as to the right of the Collector to make the particular reassessment, but only that his assessment was not conlcusive.

The case of U. S. *v.* Vitelli (T. D., 34194), decided by the Court of Customs Appeals February 10, 1914, presents the only instance of judicial affirmance of the Collector's right to reliquidate upon the ground of fraud after one year from the date of entry. But in that case the importer, having paid the duty and protested and having elected to proceed before the Board of General Appraisers and the Customs Court, accepted that remedy with all its incidents. In so far as it recognizes the right of the Collector to reliquidate upon the ground of fraud after the expiration of one year from the date of entry the soundness of its conclusions are contested here.

2. The power to find fraud can not be raised by implication, where it would confer upon an administrative officer the right to reopen matters which are *res judicata*, by *ex parte* administrative fiat, without limit as to time or extent.

We must reiterate that all power of reliquidation is implied. This Court is now asked by the Government to extend this implication so far as to vest in an administrative officer a power of summary and *ex parte* conviction, not possessed by any Court in the land.

Chief Justice Marshall observed in United States *v.* Fischer (2 Cranch, 358, 390):

> "That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted. * * * Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intent must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

The most serious objection to these complaints is that, to support them, a despotic power in the Collector must be derived from language lacking in all affirmative character and not justifying even a feeble inference of such a grant.

If, as the Government contends, it was the object of Section 21 of the Act of 1874 to place a limit upon a power of reliquidation which before that time was unlimited, is it probable that Congress intended to leave the question whether the limitation had run

to the determination of the Collector himself? If so, there could be only such finality to a settlement of duties as a Collector chose to allow. As state statutes of limitation do not bind the Government, there would be nothing to prevent a Collector from reliquidating as for fraud, upon mere conjecture and suspicion, years after the importation, and after all possibility of establishing the good faith of the transaction had been lost. If the importer, or, possibly, his heirs or personal representatives were without evidence or without means to meet a potentially ruinous demand, they would be defenseless and could not avail themselves even of the imperfect remedy of paying under protest and shouldering the burden of presumptive guilt.

In the case of U. S. *v.* Federal Sugar Refining Co., 211 Fed., 1016, Judge Coxe, sitting in the District Court, for the Southern District of New York, disposed of the Government's position on the point in the following language:

> "If fraud be shown, it may be inquired into. Who is to determine the existence of this fraud? If the Collector be the sole and final arbiter, he is invested with autocratic power. At any time he may, by the mere assertion that he has found an entry which is fraudulent, reliquidate it, without a particle of proof and the victim is remediless. * * *
>
> "Pursuant to Section 21, *supra*, the original liquidations and payments of duties were final

and conclusive upon all parties in the absence of fraud. If fraud be proved, then they are not conclusive. The statute does not say that the Collector shall determine this question. But, assuming that he may do so in the first instance, where is the law which makes his decision "final and conclusive"?

"If the plaintiff's contention be correct, there will never be a time when the importer will be safe. Whenever the Collector desires to do so, he may make a decision of fraud, reliquidate the duties and the importer will be remediless. If the findings and decisions of the Collector are final, there is no answer that the defendant can make, even though he can prove conclusively that no fraud existed. Such a result is abhorrent to my sense of justice and is, I think, contrary to the principles of American jurisprudence. If the allegation stated in Paragraph Ninth of the complaint was stated, not as 'findings and decisions,' but as *facts*, the defendant by denying them would have its day in court and an opportunity to prove that there was no fraud."

Section 21 of the act of 1874 makes the "settlement" of duties final and conclusive upon all "parties" after the expiration of one year. This language binds the Government as well as the importer (U. S. v. Phelps, 17 Blatchf., 312). The mere exemption of the case of fraud from the limitation found in Section 21 of the Act of 1874 cannot confer upon the Collector the power to find fraud, where that power is no where else

conferred by statute. The power to determine fraud should not be assumed to be given by anything but the plainest language. It is not the proper office of an exception or proviso to confer a power or right by implication.

West Derby Union *v.* Life Assur. Soc., 66 Law J., Ch., 726.

People *v.* Morrill, 26 Cal., 336, 354.

Clark's Appeal, 58 Conn., 207.

Swigart *v.* People, 154 Ills., 284, 297.

The presumptive object of Section 21 of the Act of 1874 was to set forever at rest, after the expiration of one year, matters which had become *res judicata* under a previous decision of the Collector. This purpose is better attained by a construction which treats the statute as destroying the power of the Collector to reliquidate after one year, leaving to the Government (or the importer for that matter) the right to attack a previous liquidation collaterally where it has been induced or tainted by fraud. Under such a construction the remedy of the Government would be complete, as shown in Point VI, *infra*. Under any other construction the Collector could defeat the object of the statute at will; a result so inconsistent with its obvious purpose that it should not be adopted if another interpretation consistent with its language and more responsive to its intent can be found.

Interstate Commerce Commission *v.* Louisville & Nashville R. R. Co., 227 U. S. 88, 91:

"If the Goverment's contention is correct, it would mean that the commission had a power

> possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercisive power."

The proceeding in question was admittedly *ex parte*, which precludes the idea that the importers had notice, or were given an opportunity to produce witnesses and defend themselves against charges of which, presumably, they knew nothing.

We submit that, even if the Congress undertook by express enactment to give the Collector the power to determine the existence of fraud in such cases, so as to make his decision thereon *prima facie* evidence of the fact and entitle it to the presumption of correctness, there should be read into such grant of power, if not therein expressed in terms, implied condition of an orderly and proper investigation which should accord to the accused person notice and an opportunity to be heard.

Section 21 of the Act of 1874, then, leaves it open to the United States to challenge a liquidated entry on the ground of fraud, irrespective of the lapse of time, but, in the absence of other direction, the right must be

exercised under the recognized forms and in the recognized forums for the trial of such issues—in a form which will apprise the importer of the nature of the fraud charged, and in a forum which will enforce the cardinal rule of evidence that "He who alleges, must prove," and apply the consecrated maxim that "fraud is never presumed."

It is the primary contention of the defendants in this case that the complaints are defective for the reason that no statutory authority to reliquidate upon the ground of fraud, in any sense which would make this decision even *prima facie* evidence of the existence of fraud, is vested in the Collector, and that every sound rule of law is opposed to the raising of such power by implication.

II.

In a suit against an importer to recover an alleged balance of duties due upon reliquidation of entries, he may set up the defense that the reliquidation is beyond the collector's power, and may do this by demurrer if the defect appears upon the face of the complaint.

When the statute says that the liquidation shall be "final and conclusive," it means a valid liquidation, not a void liquidation.

U. S. *v.* Thurber, 28 Fed., 56:

> "The ordinary rule unquestionably is that where a statutory officer has jurisdiction over

the subject, his determination is conclusive, except upon a review in such way as the law points out for the correction of errors. But there is one fundamental exception to this rule. Not only must the officer have jurisdiction of the subject-matter, but he must also keep within the limits of the power conferred by statute. Whenever a suit is brought, based upon such officer's action, it is always competent, by way of defense, to show that the officer has departed entirely from the statute, or acted so contrary to it that his acts are deemed beyond his jurisdiction, and in excess of power; and in such a case what he does in excess of power is illegal and void, and may be shown in defense. Void acts are thus wholly different in their consequences from merely erroneous acts. Mere errors or mistakes in the performance of a duty do not make the officer's acts void. They stand good and valid until reviewed and corrected as provided by law.

The general principle is well settled that when an importer or other taxpayer proceeds against the Government for the recovery of a tax, he can proceed only in the manner prescribed by statute. But there is some conflict of authority upon the question whether the taxpayer may avail himself of his legal defenses when the Government enters Court to recover an unpaid tax. In the Tiffany case (151 Fed., 473), and others of similar import, reassessments were held to be final and not open to attack in actions for unpaid

duties. In the case of U. S. *v.* Schlesinger (120 U. S., 109), the right of the importer to show the illegality of the assessment as a defense was upheld by the Supreme Court where the payment of the tax would have left the importer without remedy. In short, the Court refused to hold a decision of the Secretary of the Treasury, made under Section 2931 of the Revised Statutes, to he "final and conclusive" under the peculiar circumstances of that case. It refused to apply the letter of the statute where it would result in manifest injustice.

But if the liquidation is wholly outside the collector's power and jurisdiction, it is void, and if the collector's act is void, all argument as to its finality is beside the issue. There can be no doubt of the soundness of the rule that when the Government itself resorts to the aid of the courts for the collection of a tax, it must allege and prove an assessment which the officer has power to make and its action is open to the defense that the official act is in excess of authority and void.

Clinkenbeard *v.* U. S., 21 Wall., 65:

> "It is undoubtedly true that the decisions of an assessor or board of assessors, like those of all other administrative commissioners, are of a *quasi* judicial character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property, or operations not taxable, such assessment is illegal and cannot form the basis of an action at law for the collection of the tax."

U. S. *v.* Myers, 3 Hughes, 239, 27 Fed. Cas., 43.

U. S. *v.* Bank of America, 15 Fed., 730.

U. S. *v.* Nebraska Distilling Co., 80 Fed., 285 (C. C. A.).

If acts outside of the official jurisdiction may be set up by way of defense in an answer, it necessarily follows that they may be taken advantage of by demurrer if the complaint fails to show that the act was within the officer's legal province.

Southern Pacific Co. *v.* Denton, 146 U. S., 202.

Gilbert *v.* York, 111 N. Y., 544.

III.

Assuming (but not admitting) the Collector's power to reliquidate, after the expiration of a year, upon the ground of fraud, nevertheless, Section 21 of the Act of June 22, 1874 (18 Stat., 190), must be regarded as an express restriction upon official power, and fraud must be pleaded as a condition precedent to the exercise of the power. The statute need not be pleaded by the defendant as a Statute of Limitations.

The complaint in Action No. 1 is fatally defective, even if the Government's theory were to prevail that the Collector have power to reliquidate as for fraud more than one year after entry. This consists in its

failure to allege that the reliquidation, declared to have taken place after the expiration of one year from the date of entry, was made upon the ground of fraud.

The Government contends that Section 21 of the Act of June 22, 1874, is a statute of limitations, and that objection to a liquidation, upon the ground of its having been made more than one year after entry, is waived, unless the importer pleads specially, by way of defense, that the reliquidation was not made upon the ground of fraud.

This contention overlooks the fact that Section 21 is essentially a statute limiting the *power* of the officer, rather than a statute affecting the *remedy*. It was so construed in U. S. *v.* Leng (18 Fed., 15), where it was held that if the reliquidation be lawfully made within the year, the suit for duties could be brought at any time afterwards. As a limitation upon official power, Section 21 is equally effective as if it were a part of the original grant of power.

If there were proceedings of a judicial nature before the Collector, conducted with the usual formalities, the Government might forcibly argue that the statute should be there pleaded as a bar to the proceedings, or be deemed waived; but there are no such proceedings before the Collector, no pleadings are filed, and hence no rules of pleading could apply.

In Bandler *v.* Hill (146 N. Y. Suppl., 103) it was urged that a statute limiting the time within which a county treasurer could entertain applications for cancellation of

tax sales was a Statute of Limitations which did not affect the officer's jurisdiction to entertain applications after the expiration of the time limited, but constituted merely matter of defense in the proceeding before the officer. The Supreme Court of New York said (p. 104):

> "As the purchaser has no opportunity under the statute to defend against the application, it can hardly be said that the period of limitation is matter of defense, but rather, and for that very reason, it would seem that the provision for a limitation of time was intended to prescribe a condition precedent to the exercise of jurisdiction."

The Statute of 1874 is an express prohibition, binding the Collector against disturbing the previous "settlement" of duties after the expiration of the prescribed time. Viewed in its most favorable aspect for the Government, it limits strictly the time within which matters which have become *res judicata* may be reopened. It thus operates as an express restriction upon the power or right. Somewhat analogous are those statutes making the probate of a will of real estate conclusive after a fixed period, which are held not to be statutes of limitation, such as can be waived by the parties, but as establishing a rule of property and directly affecting rights.

Meyer *v.* Henderson, 88 Md., 585, 592.
Luther *v.* Luther, 122 Ill., 558, 564.
Evansville Ice, etc., Co. *v.* Winsor, 148 Ind., 682.

Bartlett *v.* Manor, 146 Ind., 621.
Cochran *v.* Young, 104 Pa. St., 333.

Since, by the express terms of Section 21 of the Act of 1874 the existence of fraud or a protest are absolute prerequisites to the exercise of the power of reliquidation (assuming it to exist) after the year has elapsed, it follows that a reliquidation of the entry, after that time, is *prima facie* without authority. Statutory conditions of this kind must be pleaded as a part of the case of the party who relies upon the official act, and the limitation is not waived by failing to plead it as a defense.

Arnson *v.* Murphy, 115 U. S., 579, 584.
DeBary *v.* Dunne, 162 Fed., 961.
Stern *v.* La Compagnie Generale Transatlantique, 110 Fed., 996.

Under this principle the complaint in action No. 1 is plainly demurrable.

IV.

Premising his authority to make the contested reliquidations, it is insufficient to allege the Collector's conclusions as to the existence of the statutory condition which permits him to act, to wit, fraud. In other words, the existence of fraud is a jurisdictional fact, which must be alleged affirmatively as a fact, and an allegation of the officer's findings as to its existence is insufficient.

The complaint in Action No. 2, which alleges reliquidations more than one year after entry, pursuant to

the "findings and decisions" of the Collector that there was fraud, is likewise insufficient because of its failure to allege, in an affirmative manner, the jurisdictional fact of fraud.

There can be no question regarding the presumption of regularity and verity attending official acts, upon which the Government lays so much stress. But it is equally well settled that the *jurisdiction* of inferior tribunals or of administrative officers acting in a quasi-judicial capacity will not be presumed. Speaking with reference to courts of special and limited authority in Galpin *v.* Page (18 Wall., 350), Mr. Justice Field said:

> "As to them, there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record, of their judgments will be deemed void on their face."

A fortiori would this be true of administrative officers acting under the circumscribed authority of special statutes. In Galpin *v.* Page, *supra*, at pages 370-71, the Court quoted with approval the following remarks of Mr. Justice Coleridge in Cristy *v.* Unwin (3 Perry and Davison, 208):

> "However high the authority to whom a special statutory power is delegated, we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. This rule applies equally to an order of the Lord Chancellor as to any order of Petty Sessions."

Especially is there no such legal presumption in favor of jurisdiction in *ex parte* proceedings or proceedings not according to the common course of justice. In such cases, even the jusdiction of superior Courts of general powers is not presumed, but must appear upon the record.

Galpin *v.* Page, *supra.*
Sabariego *v.* Maverick, 124 U. S., 261.

Under this principle, it is plain that the existence of the fact justifying the exercise of the official power must be alleged in such manner as to enable the defendant to join issue upon it and to throw upon the party claiming under it the burden of establishing the existence of such condition. This requirement is not satisfied by a pleading in behalf of the United States which alleges merely that the Collector found fraud. The defendant has a right to deny and put the Government to proof of the jurisdictional fact.

In the case of Sabariego *v.* Maverick (124 U. S., 261), the question was presented whether a conveyance, made by the proper officer, and reciting that the land conveyed thereby had been confiscated for the treason of its former owner, was to be regarded, under the presumption of regularity, as evidence of the fact that the property had been confiscated by appropriate proceedings, so as to validate the grant. The remarks of Mr. Justice Matthews, in holding that no such presumption arose, are so illuminative upon the general principle that they are quoted at some length:

> "In the present case, the documents in question declare that the property of Miguel Lo-

soya is in the hands of public officers charged with its custody, as having been confiscated with that of others described as rebels, and regular and appropriate steps are officially taken to procure its sale as such. To justify the lawfulness of these proceedings unquestionably requires us to assume a prior and legal procedure against Miguel Losoya, resulting in the confiscation of his property for the alleged offence in accordance with existing law; but the legality of the procedure resulting in the sale of his property on the basis of that assumption is the very thing in question to be proved, and we are at last still confronted with the inquiry whether the absence of proof of the principal fact, on which the legality of everything succeeding it depends, can be supplied by a mere presumption. * * *

" The presumption to which we are asked to resort for an answer to the question is, however, not peculiar to any system of law. It is found in the law of all civilized States, and the phrases in which the maxim is expressed are taken from the civil law, the basis of the jurisdiction of Spain as of all other European states, and imported into the common law of England as adopted by us. *Omnia præsumuntur rite esse acta* is its familiar form, but as said by Mr. Best (Principles of Evidence, Sections 353, 361): '*The extent to which presumptions will be made in support of acts depends very much on whether they are favored or not by law, and also on the nature of the fact required to be presumed.' It does not*

apply to give jurisdiction to magistrates or other inferior tribunals; nor to give jurisdiction in proceedings not according to the common course of justice. * * *

"If we had before us an actual and formal decree of a competent tribunal adjudging him guilty of the offence, and confiscating his property in punishment therefor, that of itself would not be sufficient to establish its own validity. We should still require record evidence of the existence of those facts which brought him and his property within the jurisdiction of the tribunal pronouncing such a decree. * * *

"If the mere decree and sentence of a court standing by itself, without the record of those prior proceedings necessary in law to support the judgment, is not receivable in evidence as proof of its own legality, *a fortiori* no effect can be given to the proceedings in this case, unless sustained by proof of the actual proceedings against Miguel Losoya and his property conducted according to law to a sentence of judicial confiscation. The mere recital of the fact in the documents of sale is not evidence of the fact."

Note, also,

Interstate Commerce Commission *v.* Northern Pacific Ry. Co., 216 U. S., 538.

So, where a right of action is given against the Government for the recovery of taxes or duties, upon the existence of certain facts or compliance with certain requirements, such facts or compliance must be pleaded

and proved as a condition precedent to recovery, and the failure of defendant to allege non-compliance does not waive the objection. There cannot be one rule of pleading a statutory condition for the taxpayer and another for the Government.

Arnson v. Murphy, 109 U. S., 379.
De Bary v. Dunn, 162 Fed., 961.
Stern v. La Compagnie Generale Transatlantique, 110 Fed., 996.

The presumption that public officers have done their duty is not a substitute for proof of an independent material fact upon which their right to act depends.

U. S. v. Jones, 19 Wall, 598.

Note also,

U. S. v. Ross, 92 U. S., 281.
U. S. v. Carr, 130 U. S., 681.

V.

Whether averred as a fact or as the finding of the Collector the bare allegation of fraud is insufficient to establish jurisdiction in the Collector, for the reason that he could not relinquish for fraud under all circumstances and conditions, but only in the exercise of his functions as an assessing or classifying officer. In other words, the pleading should specify whether fraud exists in the dutiable value, or in the classification, or in the quantity of the merchandise.

Still assuming that the "decision" of the Collector provided for in Subsection 14 of Section 28, Tariff

Act of August 5, 1909 [36 Stat., 100], includes a reliquidation, and that such reliquidation, when made within the Collector's authority, is as conclusive as the original liquidation, it yet remains true that the power to reliquidate is limited by the scope of the Collector's general powers and that he could not reliquidate upon the ground of fraud in those instances where a reliquidation would not be justified in the absence of fraud.

The Collector of Customs has no roving commission under the tariff administrative statutes to investigate and make conclusive findings with respect to every factor entering into the rate and amount of duty, or to decide in every instance what is and what is not dutiable. While no provision of law can be pointed out which precisely defines the limits of his powers, a cursory view of the system as a whole will show that they are extremely circumscribed.

1. A collector has no power to reliquidate an entry upon a higher value for the merchandise than that found upon original appraisement, after the expiration of the sixty days in which he may appeal for reappraisement.

It is well settled that a Collector of Customs cannot act as an appraising officer. Subsection 13 of Section 28 of the Tariff Act of 1909, 36 Stat., 100 (which has been the law for many years), makes the decisions of Appraisers and General Appraisers upon questions of value "final and conclusive against all *parties.*" The word "parties" includes the Government as well as the

importer (U. S. *v.* Phelps, 17 Blatch., 312; U. S. *v.* Leng, 18 Fed., 15). By that provision the Collector has sixty days to appeal from the appraisement of the local appraiser, and the act provides that the decision of that officer, in case of no appeal, or of the General Appraisers if an appeal is taken—

> "Shall be final and conclusive against all parties and shall not be subject to review in any manner for any cause in any tribunal or court, and the collector or the person acting as such shall ascertain, fix and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon according to law."

When a collector of customs has liquidated the entry at the appraised values, without appeal for reappraisement, he has no power to reliquidate the entries at an advanced value, even though the original appraisement was induced by fraud.

> U. S. *v.* Calhoun, 184 Fed., 499; affd. by C. C. A., 2nd. Circt., 1914, 215 Fed., 709:
>
> "From every point of view, even from the very scheme and structure of the whole system, it is apparent that the reliquidation of the collector cannot include a reappraisal, but must proceed upon the basis of the old appraisal."
>
> T. D. 34917, G. A. 7636 (November 16, 1914):
>
> "The exact date when the collector obtained knowledge of the private invoice is not shown,

but it may be presumed that it was more than 60 days after the appraisment, and hence too late for him to appeal to reappraisement. (Paragraph M, Section 3, Act of October 3, 1913.) The protest therefore squarely presents the issue as to whether, under such circumstances as these the collector may reliquidate an entry, when no reappraisement has been held, upon a valuation higher than that at which the goods were entered and finally appraised. The case is one in which, if any possible construction of the law permits the collector to take this action, it should be adopted, for, on the facts as disclosed to the board and not contradicted by the importers, a palpable fraud has been committed upon the United States. * * * Although the collector in his report to the board repudiates the suggestion that he made a new appraisement in the case, his reliquidation at a higher valuation than that approved by the appraiser is the same thing in effect, and in the present state of the law it must be held unauthorized. Many reasons conduce to this conclusion. *In the first place, nowhere in the statutes is there found any express grant of authority to the collector to reliquidate in the manner he has done here. He is a statutory officer, and his power and authority are only such as are granted to him by the statute,* and if he undertakes to perform acts which he is not authorized to do his action is clearly illegal and void. On the other hand, there is a statute which makes the decision of the appraiser as to

value, where there has been no reappraisement, absolutely final and conclusive as against all persons. * * * This language is peculiarly emphatic, and it would seem to bar such an action as the collector took in this case."

T. D. 23601, G. A. 5100.
T. D. 18617, G. A. 4015.
T. D. 25970, G. A. 5896.
T. D. 27492, G. A. 6402.

Tucker *v.* Kane, Taney, 146; 24 Fed. Cas., p. 268.

U. S. *v.* Frazer, 10 Ben., 347; 25 Fed. Cas., p. 1207.

U. S. *v.* McDowell, 21 Fed., 563.
U. S. *v.* Thurber, 28 Fed., 56, 58.
U. S. *v.* Bennet, 2 Ct. Cust. App., 249.

A fortiori is a reliquidation at an advanced value illegal, when made more than a year after entry and not based upon any proper action of the appraiser.

Beard *v.* Porter, 124 U. S., 437.
U. S. *v.* Campbell, 10 Fed., 816.
U. S. *v.* McDowell, 21 Fed., 563.

Where, therefore, a Collector of Customs, not having availed himself of the remedy afforded by appeal to reappraisement, reliquidates an entry at an advanced value, whether within or after the expiration of the year, and whether or not upon the ground of fraud, his action is an absolute nullity. There can be no finality to his assessment, because it is not a decision contemplated by law or one which he has power to make. There being no valid decision of the Collector, it fol-

lows there is no need for protest or appeal to the Board of General Appraisers, and the Collector's anomalous action is open to all collateral attack.

2. The Collector is without authority to reliquidate upon the basis of his own findings as to weight, after merchandise has been regularly weighed by United States weighers and duties liquidated accordingly.

As further illustrating the limitations upon the Collector's functions may be mentioned the ascertainment of weight of dutiable merchandise. Under the statutes and regulations of the Treasury Department this is the function of the United States weighers or gaugers, who are appointed by law and specially invested with authority to weigh, gauge or measure merchandise.

U. S. Rev. Stat., Sec. 2890.
Customs Regulations, 1908, Articles 1478–1512, incl., Arts. 1034, 1036;
T. D. 16637, G. A. 3282.
T. D. 23871, G. A. 5178.
Manhattan Gas Light Co. *v.* Maxwell, 2 Blatch., 405, 16 Fed. Cas., p. 601.

In Marriott *v.* Brune (9 How., 619, 634), the Supreme Court observed that if Appraisers undertook to ascertain the weight or quanity of goods "their action in that respect is *coram non judice* and a nullity."

In Earnshaw *v.* Cadwalader (145 U. S., 247, at p. 259), the same tribunal said of the weighers' returns, "the weight so taken was entered in a book and became a public record of the Government weight of the importation. No statute authorized a deduction

from such Government weight in imposing the duty." If no deduction is authorized it follows that no addition is authorized unless determined in the mode prescribed by law.

The sound principle appears to be that neither Collectors nor Appraisers can modify the weigher's return of bulk commodities, though the Appraisers are authorized to ascertain the number of "yards, parcels, or quantities," of other merchandise in certain instances.

U. S. *v.* Rosenthal, 126 Fed., 766, at p. 777.
Subsection 10, Section 28, Tariff Act, August 5, 1909 (36 Stat., 97).

No statutory or judicial authority has been or can be pointed out which gives the Collector authority to reliquidate at an advanced weight, after the merchandise has gone into consumption, and all possibility of reweighing has disappeared, and in particular is there no such authority after a year has elapsed from the date of entry. Here, again, we are apparently confronted with an instance where a reliquidation even within a year, at an advanced weight, not based upon a reweighing, would be no decision at all, and would have no binding effect upon anybody.

3. The Collector's powers are limited strictly to imported merchandise.

It is axiomatic that the Collector's power of liquidation and reliquidation is limited to "imported" merchandise. If, through mischance or intention, he assesses merchandise not "imported" within the meaning of the

tariff laws, his action would not be a decision authorized by law, and would not be conclusive in any sense which would require the importer to pay the duty under any liquidation or reliquidation made with reference thereto and go before the Board of General Appraisers. This would be true of assessments upon ships and vessels (*ex parte* Fassett, 142 U. S., 479; The Conqueror, 166 U. S., 110; The International, 89 Fed., 484); salvaged goods in certain cases (Merritt *v.* One Package, 30 Fed., 195; Lewis *v.* 65 Packages, 32 Fed., 111); ships' equipment (U. S. *v.* Chain Cable, 2 Sumn., 362; 25 Fed. Cas., 391); goods brought into the country by accident, superior force or necessity, and not entered into commerce (The Concord, 9 Cranch., 387; The Gertrude, 3 Story, 68; 10 Fed. Cas., 265; U. S. *v.* Eighty-five Head of Cattle. 205 Fed., 679); goods brought from ceded territory no longer a "foreign country" within the meaning of the tariff laws (De Lima *v.* Bidwell, 182 U. S., 1).

4. The pleading should set forth sufficient facts to make it appear whether fraud exists in the dutiable value, or in the classification, or in the quantity of the merchandise.

The naked allegation that fraud exists or that the Collector has so found does not plead the existence of such fraud as would warrant a reliquidation of the entries by the Collector.

The "decision of the Collector" which is made final and conclusive by Subsection 14 of Section 28 of the Tariff Act of August 5, 1909, does not refer

to every computation of the duties which that officer may see fit to make. On the contrary, it necessarily means a decision reached in strict pursuance of his legal powers as conferred by statute. For example, the Collector undoubtedly has power to decide as to the "rate" of duty, or the classification of the merchandise, and may compute the "amount" of duty predicated upon the quantity or value found and returned to him by the offices in whom the law reposes the power to determine these factors in the amount. But, as already seen, it is not the function of the Collector to fix or change the two factors of value or quantity. Since he could not lawfully predicate his original decision or liquidation on his own findings as to these factors, it necessarily follows that he could not reliquidate upon his own findings that the merchandise had been fraudulently undervalued or fraudulently underweighed. If the Collector have the power to reliquidate either within or beyond the year upon the ground of fraud it must be in a limited class of cases and that condition of fraud must be alleged which establishes his jurisdiction. If the Government's theory of implied power of reliquidation be sound, it may be that an allegation of fraudulent misdescription of the merchandise and reliquidation after the year upon that ground would be good. It seems equally clear that an allegation of reliquidation based on the Collector's own findings of fraudulent undervaluation would not state a cause of action.

The defendants respectfully insist that the inherent limitations upon the Collector's powers require that a complaint which relies upon his official reliquidation should state affirmatively sufficient facts to show a case warranting reliquidation in the exercise of his functions as an assessing or classifying officer.

A complaint which failed to allege that the goods were *imported* would be demurrable. A complaint would appear to be equally insufficient which did not allege that the fraud, or the "findings and decisions" of fraud, upon which his reliquidation was based, were in respect to the classification of the goods, or to some other particular, the determination of which is within his functions as a classifying officer.

The Government argues that the Collector has general jurisdiction of the "subject matter" and that his reliquidation will be presumed legally performed until proof to the contrary is adduced, and maintains that the objections here urged must be asserted in defendant's answer and proved in his defense.

If, as plaintiff apparently assumes, "subject matter" is equivalent to "imported merchandise," the conclusion might logically be drawn that any reliquidation with reference thereto would be presumptively regular. But "jurisdiction of the subject matter" means "cognizance of the class of cases to which the one to be adjudged belongs" (Reynolds *v.* Stockton, 140 U. S., 254, 268). It means power to try the individual cause. It has been seen that the Collector could not reliquidate upon

his own finding of an advanced value for the merchandise, because that function is outside of his jurisdiction altogether, the appraisal of goods being committed to another officer. Since he cannot reliquidate under all circumstances of fraud it would seem necessary that he set up facts sufficient to show authority. These should appear positively. It is not enough that they may be inferred argumentatively.

Continental Insurance Co. *v.* Rhoads, 119 U. S., 237.

Brown *v.* Keene, 8 Peters, 112.

Otherwise there must be a presumption of the existence of jurisdictional facts, which, in the case of an inferior tribunal, never obtains [Point IV, *supra.*]

Setting up sufficient facts to make it plain whether fraud exists in the dutiable value or the classification or in the quantity of the merchandise does not necessarily mean, as plaintiff appears to suppose, setting out all the facts constituting the fraud.

VI.

The remedy of the Government for the recovery of duties withheld through fraud is complete without extending by implication the Collector's powers of reliquidation to cover such cases.

It is argued in behalf of the Government that "a reliquidation is a necessary preliminary at all times to

any suit by the Government to recover a deficiency under a preceding erroneous liquidation" (Brief for the Government, p. 18). If this were a correct statement of the law, it might be persuasively addressed to Congress as a reason for supplying the remedy by legislation, but would hardly justify a Court in extending by implication the drastic powers already conferred upon administrative customs officials. But an examination of the authorities will show that the law is otherwise than is stated in the Government's brief with respect to its remedy.

The rule is settled beyond question that the Government's right to duties accrues by the importation of merchandise with intent to unlade, and immediately upon the importation the duties become a personal charge and debt upon the importer. Such duties are recoverable by an action of debt, and this action will lie against the importer for the duties on smuggled goods, or where by mistake, accident or fraud no duties or short duties have been paid.

U. S. *v.* Lyman, 1 Mason, 482; 26 Fed. Cas., page 1025 (Story, *J.*).

Meredith *v.* U. S., 13 Pet., 486

Arnold *v.* U. S., 9 Cranch, 104.

U. S. *v.* Boyd., 24 Fed., 690.

U. S. *v.* Boyd, 24 Fed., 692, 694.

U. S. *v.* National Fibre Board Co., 133 Fed., 596.

U. S. *v.* Cobb., 11 Fed., 76.

U. S. *v.* Koblitz, 15 Fed., 900.

U. S. *v.* Phelps, 17 Blatch., 312, 315; 27 Fed. Cas., page 521.

It would follow as a corollary, without the aid of authority, that the importer who entered or procured the assessment of his goods at less than their true value or quantity, or through any other fraud, paid less than the amount which, immediately upon importation, accrued as a debt by operation of law, would have to make good the deficiency, in the proper form of action, irrespective of any affirmative action by the customs officers and despite their inaction, whether that occurred through mistake, negligence or corruption; and subject only to the limitation imposed by Section 21 of the Act of June 22, 1874.

And the great weight of authority supports the proposition that the intervention of the Collector is unnecessary to the recovery of customs duties wrongfully withheld from the Government. Thus in U. S. *v.* Boyd (24 Fed., 690), which was an action in the Circuit Court for the Southern District of New York for duties withheld through fraud, defendants demurred to the complaint upon the ground that it failed to allege an appraisement and liquidation by the proper officers, which, it was insisted, were conditions precedent to the right of the Government to collect.

Judge Wallace said in part:

> "The demurrer is without merit. It is a very ancient doctrine that debt lies for customs due upon merchandise even though the goods

are forfeited for non-payment of duties. The authorities are cited in the opinion of Story *J.*, in U. S. *v.* Lyman, 1 Mason, 481. Where goods were smuggled, or where the possession of the goods was relinquished by the customs officer through fraud or mistake, the duties were recovered in the English exchequer by information, and the importer might be called upon by information in equity to disclose the amount and value of the goods for the purpose of ascertaining the amount of duties payable, Attorney Gen. *v.* Crosse, 1 Parker, 279. In the case of Meredith *v.* U. S., 13 Pet., 486, where the language of the statute imposing duties upon imported merchandise was substantially the same as that employed in the statutes in force when the merchandise in suit was imported, the Supreme Court held that the right of the Government to the duties accrues, in the fiscal sense of the term, when the goods arrive at the port of entry; and that the debt for the duties is then due, although it may be payable afterwards according to the regulations of acts of Congress, as where a bond is given for the duties, or a deposit of the goods is made by the importer, in which case the importer is entitled to the time of credit allowed by law. * * * *Upon principle it would seem very plain that the defendants, who have deprived the Government by their fraudulent acts of an opportunity to appraise the goods and liquidate the duties, cannot complain because such proceedings were not taken.*"

The case of U. S. v. Nichols (108 Fed., 1003) is directly in point. There Judge Thayer, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

> "Counsel for the defendant in error further contend that the additional duty is not recoverable by the United States in an action brought for that purpose, because the complaint does not allege that the additional duty of a per centum was levied by the Collector at the port of El Paso. We are of opinion, however, that, if the additional duty ought to have been levied, collected and paid, the amount thereof may be sued for and recovered by the United States from the importer, although there was no formal levy. The right of the United States to the sum which was due to it and ought to have been paid was not forfeited by the neglect of the Collector to make a levy, even if he was guilty of such neglect. It was not within his power, by a neglect of duty, to release a tax which was due to the United States."

Likewise the Supreme Court in Dollar Savings Bank v. U. S. (19 Wall., 227), held that an unpaid revenue tax could be recovered by the Government in an action of debt, although the assessment had never been made by the proper officer and the time for making it had expired. The Court said:

> "Nor is there anything in the objection that the taxes for which judgment has been recovered in this case had not been assessed. The

other assessment than that made by the statute was necessary to determine the extent of the bank's liability. · An assessment is only determining the value of the thing taxed, and the amount of the tax required of each individual. It may be made by designated officers or by the law itself. In the present case the statute required every savings bank to pay a tax of five per cent. on all undistributed earnings made or added during the year to their contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank, and without more it made the bank a debtor."

See also

U. S. *v.* Little Miami, etc., R. Co., 1 Fed., 700.

In support of its position the Government cites the following cases:

U. S. *v.* Campbell, 10 Fed., 816, 822.
U. S. *v.* Leng, 18 Fed., 15.
U. S. *v.* McDowell, 21 Fed., 563, 564.

Of the first two cases it is only necessary to say that they do not decide the point at all. What is said in U. S. *v.* Campbell, upon the subject is *dictum*. In the McDowell case the Court appears to lay most emphasis upon the Collector's failure to apply for a reappraisement of the goods, thereby leaving the original appraisement final and conclusive. Possibly the Government might lose its remedy through such neglect, but the principle supported by the weight of authority would

appear to be that fraud would vitiate the original appraisement and leave it open to collateral attack in a suit for duties, without either reappraisement or reliquidation by the Collector. Certainly this is the regular practice in the District Court where suits are brought to enforce the penalties of forfeiture of the merchandise or its value for fraudulent undervaluation. But if it be the rule that the Government loses its remedy by failing to appeal from a fraudulent appraisement, the Collector is without power to help it, as the Collector is not an appraising officer and his reliquidation at an advanced value would be void in any event.

U. S. *v.* Calhoun, 184 Fed., 499, aff'd. by C. C. A., 2nd Circt., 215 Fed., 709.

The rule applied in the above cases where there was a failure to asses must be equally potent where the original assessment was procured through fraud. The Government's right is clear to treat such assessment as a nullity and proceed in debt as though no assessment had been made. The claim made in the Government's brief (pp. 18–19) that a reliquidation is necessary because the original assessment is valid until changed by the Collector can have no application to such a case. This would follow from elementary common law principles quite apart from Section 21 of the Act of June 22, 1874, which expressly excepts the case of fraud from its limitation.

In Conclusion.

Question No. 1 should be answered by holding that an importer of dutiable merchandise, when sued by the United States for a balance of duties found to be due upon a reliquidation of the entry, may attack the validity of the reliquidation, where it appears upon the face of the complaint that the reliquidation was made more than a year after the entry, and where the complaint contains no allegation of the presence of a protest or of fraud.

Question No. 2 should be answered in the negative.

Question No. 3 should be answered in the negative.

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